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ECCLESIA VINDICATA.

A TREATISE ON APPEALS IN
MATTERS SPIRITUAL.

WITH SUGGESTIONS FOR AMENDING THE COURSE OF PRO-
CEEDING IN APPEALS FROM THE ECCLESIASTICAL
COURTS TO THE JUDICIAL COMMITTEE
OF PRIVY COUNCIL.

DEDICATED BY PERMISSION TO
THE EARL OF DERBY, K.G.
CHANCELLOR OF THE UNIVERSITY OF OXFORD, ETC. ETC. ETC.

BY JAMES WAYLAND JOYCE, M.A.

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Synods—A Constitutional History of the Convocations
of the Clergy;" "The National
Church;" &c.*

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519

Erratum, p. 23, line 7, *dele* " and Civil."



TO THE
RIGHT HONOURABLE
THE EARL OF DERBY, K.G.

CHANCELLOR OF THE UNIVERSITY OF OXFORD,

ETC. ETC. ETC.

MY LORD,



AVAIL myself, with the liveliest satisfaction, of your permission to inscribe on the front of this small book the honoured name of your Lordship, as Chancellor of the University of Oxford, in all ages of her history the faithful and constant handmaid of the Church of England.

This favour has been granted by your Lordship, under the distinct understanding that your assent is in no way thereby pledged to any of the contents of the following pages;

still I venture to hope that they may generally commend themselves to your approbation.

A lasting remembrance abides within the Church of the valuable support given by your Lordship in Parliament to measures formerly proposed for correcting the present course of Final Appeals in matters Spiritual.

As a grateful though slender testimony of such remembrance on my part, this treatise on the subject is now most respectfully dedicated to your Lordship, by

Your Lordship's humble

and obedient servant,

JAMES WAYLAND JOYCE.

Burford Rectory, Tenbury.

June, 1862.





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2 *Dissatisfaction with the*

CHAP. I. needed. And although the difficulties surrounding measures for improvement in this respect, involving, as they do, the delicate relations of Church and State, as well as some other complicated questions, naturally render both divines and statesmen somewhat unwilling to approach the subject, still, it is not likely that the general dissatisfaction with the existing state of things will permit it to abide perpetual.

II. *Former Endeavours to improve Final Appeal Court.*

THOUGH attention has not lately been publicly called to this important matter, yet it should be remembered that a few years ago it was the subject of grave consideration among our most learned divines and most eminent statesmen. The present unsatisfactory state of the law dates indeed only from the year 1833: and yet, even so soon after its enactment

Court of Final Appeal. 3

as in the year 1847, the late revered Bishop of London introduced a Bill into the House of Lords^a to remedy the acknowledged grievance. The object of that Bill was to substitute a new Court of Appeal for the Judicial Committee of Privy Council:^b the proposition was then carefully considered and fully assented to by the Select Committee to whom their lordships referred the Bill: and as that Committee included, with one exception^c only, all the peers who had filled high legal offices, there is ample proof that statesmen fully qualified to judge thought at that time that some change was needed. Circumstances prevented this Bill from being carried through Parliament during the Session of 1847. It was, however, re-introduced,^d as amended by the Select Committee, in the Sessions of 1848-1849, but again, from various causes of delay, was suffered to remain in suspense.

Still, the matter was deemed so import-

CHAP. I.

^a Hans. 3 S
vol. III,
p. 601.

^b House of
Lords' Select
Committee

^c Hans. 3 S
vol. III,
p. 601.

^d Ibid.

4 *Dissatisfaction with the*

CHAP. I. ant that it was not permitted long to
Hans. 3 S. slumber, and in the early part of 1850^e
ol. 108, a fresh Bill was introduced, varying in
. 334. some particulars from its predecessors,
but still having the same object embodied
in one of its clauses—a reconstitution
of the ordinary Court of Final Eccle-
siastical Appeal. On that occasion the
late Bishop of London thus expressed the
sentiments which then and now generally
prevail among those who have given at-
tention to this subject:—

Hans. ut
1p. “ With^f respect to the discussion of
questions affecting matters of religion it
is quite clear that the Judicial Committee
of Privy Council is not the most fitting
tribunal. . . . At this moment a great
number both of the clergy and the laity
of the Church feel their consciences bur-
dened by the fact of questions of heresy
and false doctrine being ultimately re-
ferred to such a tribunal. . . . Not only
was it not provided that any member of

the Episcopal bench should sit as a member of the Committee, but no care was even taken that the members of it should be members of the Church of England. It might happen that the majority of the members of that tribunal might be dissenters from the Church." The Right Reverend Prelate then, after some observations on the alterations proposed in the existing Court, added,^s "If her Majesty would allow the Convocation to assemble to take this single point into consideration it would create in the Church great satisfaction." And subsequently, when commending the matter to their lordships' deliberations, he assured them that "the constitution of the Ultimate Tribunal of Appeal involved in a degree that they could hardly imagine the safety and prosperity of the Church of England."

CHAP. I.

^s Hans. 3^d
vol. 108,
p. 335.


The present Archbishop of Canterbury also on that occasion expressed his concurrence in these observations and added

6 *Diffatisfaction with the*

CHAP. I. the weight of his testimony to them, de-
Hans. 3 S. claring that “ the^h present state of the
vl. 108, law on the doctrine and discipline of the
335. Church was acknowledged to be exces-
sively defective.”

III. *Episcopal Bench consulted.*

BUT not only have we the authority of a Select Committee of the House of Lords and of the two eminent prelates above mentioned, for asserting that some change in the Court of Final Appeal is required : a general agreement to the same effect was subsequently expressed by a large majority of our bishops and by many of our leading statesmen. The Bill last mentioned was withdrawn, as it was thought desirable to deal with the question of the Court of Appeal by itself and to make it the subject of a distinct statute, inasmuch as the principle it involved was regarded of such importance as to throw into the shade all other measures for the



regulation of Church discipline. With a view, therefore, of preparing a fresh Bill on the subject, the Archbishop of Canterbury called together the bishops of England and Wales in the spring of 1850. The matter was considered¹ at several meetings attended by twenty-five out of the twenty-eight prelates of our two provinces, and the result was an almost unanimous agreement to introduce a Bill which ensured questions of doctrine on appeal being referred for decision from the Judicial Committee of Privy Council to the Bench of Bishops. And though the assembled prelates were not entirely agreed as to its provisions, yet any difference which prevailed related rather to the details than to the general principle of the proposed measure. Thus it is plain that there was then a general agreement among the members of the Episcopal bench that a remedy should be applied to an acknowledged disorder.

CHAP. I.

¹ Hans. 3 S.
vol. III,
p. 602.

8 *Dissatisfaction with the*

IV. *Late Bishop of London's Bill* *in 1850.*

CHAP. I. THE Bill, as prepared after the deliberations above referred to, was introduced into the House of Lords on the 3rd of June, 1850,^k and the memorable debate which ensued on that occasion testifies to the deep sense of the necessity for some change which was then entertained by our most eminent divines and most honoured statesmen. The right reverend promoter of the Bill, when speaking of the acceptance or rejection of measures for relief, said, "My Lords,^l I am not apt to indulge overstrained or extravagant feelings of hope or fear, but I do assure your lordships, in the words of truth and soberness, that I believe it to be impossible to over-rate the momentous consequences of the issues which hang upon that alternative. . . . It is enough to say that they involve not only the peace

^k Hans. 3 S.
vol. III,
p. 598.

^l Ibid.

but the integrity of the Church of this empire." To the same effect the Bishop of Oxford spoke; and having drawn attention to the important petitions presented in favour of an alteration in the law, concluded an eloquent appeal by addressing this exhortation to the opponents of the measure:—"Do^m not alienate from you as a party the whole body of the English Church, by showing them that at your hands they must not look even for justice. Deal more liberally and justly with her. Listen to her complaints. Do not rudely repulse her when she comes to you for redress, and seeing her value her purity of doctrine and teaching more than earthly possessions, hasten to remedy her wrongs."

CHAP. I.

^m HANS. 3!
vol. III,
p. 668.

*V. Opinions of Lay Peers on the Bishop
of London's Bill, 1850.*

THAT a sense of the grievance under which the Church labours was by no means con-

CHAP. I. fined to those of the sacred order, the support given to this measure by some of the leading lay peers in the House of Lords on that occasion bears conspicuous testimony. The present Earl of Derby added all the weight of his great authority to the claim for relief. "It was notorious," his lordship said,ⁿ "that a great and practical evil existed. That great evil was this, that at this moment the Church of England was placed in a position more disadvantageous than any other religious body on the face of the globe. . . . Nothing was more certain than that at the time of the Reformation it was intended to confirm to the Church the fullest powers of authoritatively declaring her own doctrines." And then, after quoting the royal declaration now prefixed to the 39 Articles, he added, "It was impossible that words could be more clear to show that it was intended that a spiritual body under the authority of the Crown

ⁿ Hans. 3 S.
vol. III,
p. 649.

should, from time to time, not introduce new innovations or fresh arguments, but should explain and expound the doctrine and teaching of the Church of England, and that such explanations should be entrusted not to all, but to spiritual persons only.”

Lord Derby also added, in case the House of Lords “should^o determine to apply no remedy, should declare that they would do nothing to remedy the grievance of which Churchmen loudly and justly complained, that they would run the risk of separating from the Communion of the Church, so fettered and controlled by the State, a number of its ablest and most devoted members.” And in conclusion, his lordship, stigmatizing the existing state of the law as “a great and grievous evil,”^p declared his conviction “that^q it would be a matter of satisfaction to the great body of Churchmen in this country if they knew that upon any question

CHAP. I.

^o Hans. 3 S.
vol. 111,
p. 651.

^p Ibid. p.
653.
^q Ibid.

CHAP. I. raised they had an opportunity of obtaining—not the direction of the judges, not the direction of the legislature, but for their own guidance, as dutiful members and sons of the Church, the authoritative declaration of the united heads of the Church in matters affecting doctrine.”

Lord Redefdale, Lord Lyttelton, and the late Duke of Cambridge also spoke in favour of redressing the grievance which the Bishop of London’s Bill was meant to remedy, and expressed their determination to support it.

But not only was this testimony to the desirableness of a change in the law borne by the supporters of the Bill, its opponents, while disapproving of some of its provisions, frankly acknowledged the need of amendment in the present system. Lord Brougham, even while opposing the measure as it stood, expressed his desire that some spiritual persons should be ap-

pointed to advise the Judicial Committee in trying appeals on matters of faith. CHAP. I.

“He spoke,” were his words,^r “as a member of the Judicial Committee over which he had presided for seventeen years, and he declared that in some cases he required the aid of a spiritual body in forming his judgment. He had felt the want of it in *Mastin v. Escott* severely. He had now stated his opinion in the hope that these suggestions . . . would be adopted. He was against the Bill as it stood, for he thought it perilous in the extreme; but, as a sincere member of the Church, he hoped they would at least ultimately be assented to. This was his earnest hope and trust, for he found from all the communications he had received how alarming and vexing this question was to sincere members of the Church, of whom he was one.” ^r Hans. 3 S.
vol. III,
p. 633.

Some even of those noble lords who maintained a more determined opposition,

14 *Dissatisfaction with the*

CHAP. I. on this occasion, to the measure suggested, resisted the proposition rather upon the details of the Bill than upon the general principle involved. The Marquis of Lansdowne, then President of the Council, said, " If the questions to be decided by the Privy Council were . . . questions relating to the doctrines that ought to be taught, and requiring for their decision the careful study of theology, he would entirely agree . . . that such a tribunal ought to be constituted of spiritual persons and of spiritual persons only." And though opposing the Bill then before the House, his lordship considered it desirable that some modification in the existing system should at a proper time be made, and with this view suggested some regulations which he said " might very advantageously be a subject for future consideration."

* Hans. 3 S.
vol. III,
p. 624.

† Ibid. p.
628.

Again, Lord Harrowby, though speaking against the plan then proposed, used

these words," "I do not say that the existing tribunal might not be amended;" and while deprecating, at that particular time, and for a particular reason, legislation on the subject, yet said,^x "Consider at a proper time . . . on its own merits, any suggested improvement of a tribunal which certainly was not specially constituted for its present purpose, and which may well admit of amendment to satisfy scruples and apprehensions."

CHAP. I.

^u Hans. 3 S.
vol. III,
p. 660.

^x Ibid. p.
663.

VI. *Objections raised against the Bishop of London's Bill, 1850.*

It may be here remarked, by the way, that three main objections were raised to the Bishop of London's Bill at that time, objections which probably were the chief causes of its failure.

1. The time was said to be inopportune, as any legislation on the subject, immediately following a decision of the Judicial Committee of Privy Council on

CHAP. I. a question of doctrine, which had caused much excitement throughout the country, would be very undesirable. That objection now certainly no longer exists, for the excitement consequent on the case has passed away even if the remembrance of it abides. 2. The second objection was, since it was proposed by the Bill that questions of doctrine coming before the Judicial Committee should be decided by the Bench of Bishops, as Assessors to the Court, that a difference of opinion among that venerable body would be more injurious to the cause of religion than a miscarriage in the Court itself as at present constituted. 3. The third objection, and this certainly one of great weight, was, that the judgment of the Bishops would, by the provisions of the Bill, be binding on the members of the Judicial Committee, who, meanwhile, were bound by their oaths to decide according to the conviction^y of their own minds. And this

^y Hans. 3 S.
vol. III,
pp. 623-
673.


certainly appears an almost insuperable difficulty to the measure as then proposed. However, it is not impossible but that these two last objections also might be altogether avoided by another mode of dealing with the matter which shall be examined hereafter.

VII. *Desirableness of a Remedy for the Present Grievance.*

Now from the foregoing matter it is quite clear that the Ultimate Court of Appeal in matters spiritual is no sentimental grievance. They are no fanciful complaints which are made. They are not peculiar to this party or to that, to one class of men or to another. It is really idle to say that this can be an imaginary evil which the united Episcopate of England almost unanimously sought to remedy, which right reverend prelates, most justly honoured, denounced in severest language, which some of our most emi-

CHAP. I. nent statesmen represented as urgently requiring redress, and which was admitted, even by those among the members of the House of Lords who opposed the particular remedial method proposed, as demanding at a proper time the gravest attention.

The laity, as well as the clergy, interested in having a trustworthy tribunal for deciding matters connected with their religious faith, are not insensible to the grievance of the existing system. It is a grievance felt acutely by those who are not the most restless or the most noisy of our countrymen, but who feel all the more deeply in proportion as they believe the interests involved to be the most important. To ignore its existence is neither wise nor politic, to deny a remedy is neither gracious nor just. To allow those who are best disposed towards the institutions of their country to smart under a sense of a grievous wrong



unredressed is not the part of a well-ordered State or of prudent statesmen, more especially where that wrong enters the domain of religion and insinuates itself among the deep foundations of Divine Truth. The poet of imperial Rome, complaining of her neglected fanes, uttered a warning to his country of abiding ills :—

“ Donec * templa refeceris
Ædesque labentes Deorum, et
Fœda nigro simulacra fumo.”

* Hor. Od.
III. 6. 2-4.

But the material buildings of external worship should not be regarded with such jealous care, or tended with such watchful anxiety, as the fair but more delicate fabric of the national faith.





CHAPTER II.

STATEMENT OF THE PRESENT CONDITION OF THE LAW GOVERNING ECCLESIASTICAL APPEALS.

I. Plan of Subject.

CHAP. II.



THAT the thoughts now to be suggested may be reduced into method, the subject will be divided into the four following heads:—

I. A statement of the present condition of the law governing Ecclesiastical Appeals.

II. Historical detail of the Legislation which has led to the present condition of the Law.

III. Just grounds of complaint against

the present ordinary Court of Final Appeal. CHAP. II.

iv. Suggestions for a remedy of the grievance.

II. Necessity for a Court of Final Appeal.

AN appeal has been rightly^a declared to be "a natural defence essential to every legal constitution." And the objects of such a proceeding have, by high authority in the English Church, been defined to be, "not^b for depriving any man of justice, but for the repairing a grievance, for correcting injustice or unskilfulness in the judge, and sometimes for removing the effects of ignorance on the part of an injured person." Now wherever a Christian Church has a regularly organized constitution, and where differences arising among its members have to be settled by authoritative judgments, this natural defence is every way needful. More espe-

^a Dyer, apu
Gib. Cod.
1080.

^b Ref. Let
de Appell.
c. 26.

CHAP. II. cially is this the case with such a Church as that existing in England, because here not only are sacred matters of faith and doctrine involved, but rights of property depend on those judgments; consequently, questions of extreme difficulty arise embracing considerations connected with traditional belief, formularies of faith, canon, statute, and common law. And this complication supplies an additional reason why every possible safeguard should be thrown around final decisions. Not only is this safeguard demanded by the complication of the principles on which the decisions are based, but by the paramount importance of a great part of the subject-matter involved being nothing less in some cases than the faith of the National Church. Now whether the present condition of the law governing Ecclesiastical Appeals in Final Resort is suitable to the ends in view, whether it is just to this Church, worthy of this nation,

and creditable to the wisdom of the English legislature, the reader will have an opportunity of judging as we proceed. CHAP. II.

III. *Present Gradation of Ecclesiastical Appeals.*

A DISTINCTION exists between the right of appeal in ecclesiastical causes and those which are not ecclesiastical. From judgments in Criminal and Civil Courts, even in the lowest, such as those of Petty Sessions, no appeal lies unless it is given expressly by statute. From ecclesiastical judgments, on the other hand, there always has been, of common right, an appeal from the inferior to the superior judge, whether given by written law or not. To direct, however, the application of this common right, the gradation of ecclesiastical appeals has been laid down by the Constitutions of Clarendon, and five statutes of the realm passed respectively in the years 1164, 1533, 1534,

24 *Present Condition of*

CHAP. II. 1832, 1833, and 1840, which, under the second head of this inquiry will be considered in detail. The gradation is as follows at the present time:—

^c 24 Hen. VIII. c. 12. s. 6. I. If the cause is commenced in any diocese the appeal^c lies from the Archdeacon, or his official, to the Bishop Diocesan; from the Bishop of the diocese, or his commissary, to the Archbishop of the province; from the Archbishop^d to the Judicial Committee of Privy Council.

^d 25 Hen. VIII. c. 19. s. 4; 2 & 3 Will. IV. c. 92. s. 3.

^e 24 Hen. VIII. c. 12. s. 7.

II. If the cause is commenced in an archdiocese, the appeal^e lies from the Archdeacon of any Archbishop, or his commissary, to the Court of the Arches, or audience of the said Archbishop; from the last-named courts to the Archbishop himself; and from the Archbishop^f to the Judicial Committee of Privy Council.

^f 25 Hen. VIII. c. 19. s. 4; 2 & 3 Will. IV. c. 92. s. 3.

^g 24 Hen. VIII. c. 12. s. 9; 25 Hen. VIII. c. 19. s. 3.

III. If the cause does, shall, or may touch the Crown, the appeal^g lies directly from the Court where the contention is

commenced to the Upper House of Convocation, where final judgment is to be given, for, in this case, statute law specifically forbids an appeal to any other authority^b whatsoever.

CHAP. II.

^b 24 Hen.
VIII. c. 12.
s. 9.

IV. *Courts of Appeal in Final
Resort.*

THUS in all ecclesiastical appeals the final resort, save in causes touching the Crown, is (with one qualification hereafter to be noticed) to the Judicial Committee of Privy Council, a Court thus composed,—

The President of the Privy Council, the Lord Chancellor, such members of the Privy Council as hold any of the following offices—Lord Keeper, Chief Justice of the Queen's Bench, Master of the Rolls, Vice-Chancellor of England, Chief Justice of the Common Pleas, Chief Baron of the Exchequer, Judge of the Prerogative Court of Canterbury, Judge of the High Court of Admiralty, Chief Judge of the Court in Bankruptcy; also all members of the Privy Council who have been President of that body, or

CHAP. II. have been Lord Chancellor, or have held any of the other offices before mentioned; and further power is given to the Crown to appoint by sign manual any two other Privy Councillors to be members of the Judicial Committee.

Such is the usual Court of Final Ecclesiastical Appeal statutably existing in England. And from its constitution, not one single spiritual person appearing among its specified members, it hardly commends itself as fit to deal in the last resort with deep mysteries of faith and abstruse questions of theological learning.

The qualification, however, above-mentioned must here be explained. The legislature, perceiving the unreasonableness of having assigned in 1833 spiritual questions to a purely lay tribunal in the last resort, endeavoured, when framing the Clergy Discipline Act in 1840, to remedy the anomaly in some sort by enacting¹ that if any appeal arising under that statute should be heard before the Judicial Committee,

¹ 3 & 4 Vic.
c. 86. s. 16.

every Archbishop and Bishop of the Church of England and Ireland, being sworn of the Privy Council, should be a member of the Court for hearing the particular case. But the application of this partial remedy, for an acknowledged general disorder, is really a most unhappy specimen of legislative cobbling. For thus an abnormal Appeal Court is constituted, by a particular statute, for such causes as should be commenced under its provisions, to the exclusion of that regularly constituted Court, to which, by the general law of the land, those causes would be referred. The principle is hardly commendable, that particular statutes, in dealing with offences, should each constitute its own final Court of Appeal. Should such an example be commonly followed there would be but slender guarantees for unity in legal proceedings. Some strange complications would ensue, and the same subject-matter on appeal

CHAP. II. might branch out into some very perplexing ramifications.

Having then seen—1. that by the general law ecclesiastical causes are ordinarily referable in final resort to the Judicial Committee of Privy Council—a purely lay tribunal ; 2. that such as are commenced under a particular statute are referable to a Court specially created by that statute itself ; and 3. that such as touch the Crown are referable to the Upper House of Convocation ; the next division of this subject leads me to give an historical detail of the legislation which has led to the present condition of the law.





CHAPTER III.

HISTORICAL DETAIL OF THE LEGISLATION WHICH HAS
LED TO THE PRESENT CONDITION OF THE LAW.

I. Appeals in Early Times.



IT would be beyond the requirements of the present case to investigate at length the history of ecclesiastical appeals in England before the Reformation. It may, however, be remarked here that spiritual causes were certainly then confined strictly to spiritual courts, and within the realm took the same^a course as that assigned to them by our present law, with the exception only of the Final Court, the subject

CHAP. III.

^a Constit.
Clarendon,
VIII.

CHAP. III. of our special inquiry. Such causes were, during the earlier periods of our history, generally definitively decided by the Archbishops' Courts, though on some occasions, with special permission, they were carried beyond the limits of the country, and applications were made to Rome.

Yet it is abundantly clear that such proceedings were generally opposed to the English mind and the English laws. This is plain from the continual opposition manifested to papal interference, as testified in numerous instances, and among them, by the conduct of the last of our Anglo-Saxon Archbishops, Stigand, who, though Pope Alexander II. had proceeded to the extremity^b of suspension, yet resisted strenuously for years that assumption of authority.

^b Coll. i.
529;
Thierry, i.
144.

And even after the deluge of Roman aggression which overwhelmed this Church and nation at the Norman Conquest, the right of appeal to Rome was still com-

monly denied and that resort repeatedly forbidden by law. In the reign of King William II. the Bishops and Barons declared to Anselm, who was maintaining such a course, that "it was a thing unheard^c of for any one to go to Rome (*i.e.* by way of appeal) without the King's leave." The opposition to such appeals was again manifested in the time of King Henry I, as appears by this complaint of the Pope of that date, "That the King would suffer no appeals^d to be made to him." And though the point was yielded for a short space in the reign of King Stephen, under the influence of Henry de Blois, Bishop of Winchester, yet we are assured on high authority that this was a new encroachment on national rights. "For in England," Huntingdon^e tells us, "these appeals were not allowed until Henry of Winchester, when he was legate, by ill example cruelly enforced them."

CHAP. III.

^c Gib. Cod.
p. 96.

^d Eadmer,
113, apud
Gib. Cod.
96.

^e L. 8. p.
395, apud
Gib. Cod.
96.

HAP. III.

And indeed this usurpation was nationally repudiated in the following reign of Henry II, for the Constitutions of Clarendon then resumed and maintained the ancient common right of deciding spiritual cases finally within the realm. The eighth of those Constitutions¹ declaring that the Court of the Archbishop shall be held the final resort: "*Ita² quod non debeat ultra procedi absque assensu Domini Regis;*"¹

Spelm.
onc. ii. 63.

Constit.
Clarendon,
III.

¹ From taking their information at second hand the learned Barons of the Court of Exchequer fell into a sad complication of error in delivering a judgment, July 8, 1850, on the subject of Ecclesiastical Appeals. They ruled that 25 Hen. VIII. c. 19, by giving appeals in causes ecclesiastical to the King and no further, "*did but restore the ancient law of the land as settled on this point by the Constitutions of Clarendon in the reign of Henry II, Anno Domini 1164.*" Now as the Eighth Constitution of Clarendon is the only one which deals with the matter in hand, and as that instrument lays down a principle totally at variance with the judgment delivered, one must conclude that the learned Barons failed to consult the ancient records before deciding upon their contents. It may be that the Court was

i. e. not to Rome. These Constitutions were^h again renewed in the Parliament of Northampton. Not only were appeals to Rome thus generally guarded against, but their exercise in special cases was forbidden, under severe penalties, by numerous statutes (including those of provisors and præmunire) passedⁱ in the reigns of Ed. I, Ed. III, Rich. II, Hen. IV, and Hen. V.

Now, though notwithstanding these statutes, it is clear that appeals to Rome were sometimes made, partly owing to the infusion of foreign ecclesiastics into this Church, partly arising from a tendency in high places to wink at such proceedings, yet it is equally plain that the mind of the

misled by the blunder of Sir William Blackstone^j on this point, and so lent its high authority to perpetuate his error. If so, a signal warning may be thence derived against the too common practice of taking information at second hand on grave questions, and relying on text-books instead of authentic records for instruction in constitutional law.

CHAP. III.

^h Hoved.
f. 426, 433,
465, ap. Gib.
Cod. 97.

ⁱ 35 Ed. I;
25 Ed. III. 6;
27 Ed. III. 1;
38 Ed. III;
12 Rich. II.
15; 13 Rich.
II. 2; Ibid.
3; 16 Rich.
II. 5; 2 Hen.
IV. 3; 7
Hen. IV. 8;
3 Hen. V. 4.

^j Comm. 3.
66.

CHAP. III. nation was opposed to them, and this not only from the evidence of public records, but from the history of the private conduct of many of our countrymen. The remonstrances of the clergy of English blood against Roman aggression were of constant recurrence. It certainly is not to their consent that the usurpations of the Vatican can with justice be mainly imputed. If the truth of the case is fairly investigated, it will be found that such grievances may be traced to other sources. Our kings were far from being blameless in this matter. King William I, King Stephen, on one occasion King Henry II, King John, King Henry III. contributed to the introduction here of papal authority; and, on the other hand, manifest opposition to it was displayed by our clergy in their Synods,^k and individually by such men as Langton^l and Edmund,^m Archbishops of Canterbury; Sewal,ⁿ Archbishop of York; Fulco,^o

^k Conc.
Mag. B. I.
647-686.

^l Hume, xi.
114.

^m Conc.
Mag. B. I.
647.

ⁿ Coll. 2.
548.

^o Conc.
Mag. B. I.
709, 710.

Bishop of London; Walter,^p Bishop of Worcester, and the Abbot^q of Buildwas Abbey, who certainly, in language quite unmistakable, resented the exercise of Roman authority over this Church.

CHAP. III.

^p Conc.
Mag. B. I
709, 710.

^q Ibid. 71.

II. *Change introduced by*
24 Hen. VIII. 12.

HOWEVER, to apply ourselves to the subject immediately under consideration, the course of Ecclesiastical Appeals, as settled by the Constitutions of Clarendon, 1164, prevailed here down to the year 1533; and by the eighth of those Constitutions it will be remembered, as above stated, that the final resort was limited to the Court of the Archbishop, beyond which the cause could not be carried without royal consent to Rome. The change made in the year 1533, by the statute 24 Hen. VIII. 12, was this. Whereas with the King's leave an appeal was previously allowed from the Archbishop's Court to

CHAP. III. Rome, no appeal could henceforward "be
 Gib. Cod. used ' but within this realm," and every
 080. case was to be finally decided here in the
 24 Hen. Archbishops' Courts " without any other
 'III. 12. 6. appellation^s or provocation to any other
 person or person's Court or Courts."

One proviso, however, was attached to the Act of 1533, a proviso existing in full force to this day, that, in any case "*touching the King*," the appeal should be to the Upper House of Convocation, where a final decree should be made, " never ' after to come in question and debate, to be examined in other Court or Courts." Such was the effect of the statute 24 Hen. VIII. c. 12, an Act entitled, " No appeal shall be used but within this realm." And thus stood the law in 1533; the final appeal in ordinary cases lying to the Archbishop.

Ibid. 9.

A few words may here be properly introduced on the subject of the proviso above referred to. This Act was passed

in the early spring of 1533, *n. s.*, that is, between Feb. 4 and April 7 of that year, which was the period during which the Parliament sat. Now at that very time a case very nearly touching the King was pending in the Convocations of Canterbury and York, being nothing less than his Majesty's divorce from Queen Catharine of Arragon. The real question at issue was whether King Henry's marriage to Queen Catharine, who was his brother Arthur's widow, was valid, the marriage having been contracted under a dispensation^u from Pope Julius II. And it is difficult to overrate the importance of this great State question, inasmuch as in it is involved the legality of the King's second marriage to Ann Boleyn, and consequently the legitimacy of the inheritor of the Crown in the person of the issue of that marriage, Queen Elizabeth. Two questions, therefore, were then proposed for the arbitration of the English Con-

^u Coll. 4.

CHAP. III.

* Conc.
Mag. B. 3.
756.

† Ibid.

† Ibid. 767.

▪ Ibid. 759.

vocations. I. *Was the marrying^x a deceased brother's wife, after the consummation of marriage, prohibited by God's law and above the Pope's dispensation?* II. *Was the marriage between Prince Arthur and Queen Catharine consummated?* Both these questions were decided in the affirmative in the two Convocations: in Canterbury,[†] on a division as to the first question, by 263 votes to 19; as to the second, by 41 affirmatives. In York, as to the first[‡] question, by 51 votes to 2; as to the second, by 49 or 50 votes to 2. On the 5th of April Dr. Tregonwell appeared as Counsel for the King in the Canterbury Synod, and on May the 13th Master Rolland Lee appeared in the same capacity at York, and the necessary instruments, in accordance with the above decisions, having been drawn, the formal sentence[▪] of divorce was pronounced on the 23rd of May, 1533, in the church of St. Peter,

Dunstable, that place being chosen as neighbouring^b to the residence of Queen Catharine at Ampthill. The united authority of the English Provincial Synods here emphatically disclaimed the authority of the Pope to grant such a dispensation for King Henry's marriage to Queen Catharine as had been given. And as it was all-important, not only upon personal, but upon State grounds, that no appeal should be even contemplated from this decision, one does not wonder at the provision in 24 Hen. VIII. 12. 9, that in cases touching the King the Upper House of Convocation should be an authority in final resort.

CHAP. III

^b Coll. 4.

215.

*III. Change introduced by**25 Hen. VIII. 19.*

WE now proceed to the next change which took place in the law regulating the Court of Final Appeal in Causes Ecclesiastical. That change took place in

CHAP. III., the following year, 1534, and was effected by the statute 25 Hen. VIII. c. 19.

It must be remembered that in this year the formal severance of the Church of England from the Church of Rome took place by the acts of this national Church herself. She then, by her own voice, asserted her ancient independence in her Provincial Synods. For the following decision was carried from the Lower House^c of Canterbury to the Upper on March 31, 1534, and was ratified at York^d on May 5 following:—
 “THE POPE OF ROME HATH NO GREATER JURISDICTION CONFERRED ON HIM BY GOD IN HOLY SCRIPTURE, IN THIS KINGDOM OF ENGLAND, THAN ANY OTHER FOREIGN BISHOP.”

^c Wake MSS. Ch. Ch. Oxford, ad an. 1534; Conc. Mag. B. 3. 769.
^d Ibid. 782, 3; Wake's App. 221.

And not only was the renunciation of the Pope's supremacy and the assertion of national independence thus ratified by the English Synods; the same course was pursued by the several religious bodies

throughout the country. Original instruments executed by them on this subject remained for many generations preserved in the Exchequer. The learned Mr. Wharton^e had in his custody no less than 175 copies thence transcribed, containing the subscriptions of the bishops, chapters, monasteries, colleges, and hospitals of thirteen dioceses. He also said, that, to his certain knowledge, the subscriptions of the remaining dioceses were lodged elsewhere, so completely was the rejection of papal authority here ratified by the acts of the English Church herself. In the face of such historical facts one is really somewhat surprised at the statements so boldly made, and so frequently reiterated, that the emancipation of this Church from Roman trammels, and the recovery of her national independence, were effected by the authority of the State alone, and in opposition to the will of the clergy themselves.

^e Coll. 4.
267.

CHAP. III. However, in this year, 1534, when the independent nationality of this Church was just being restored, and when the principle consecrated in Magna Charta, the footstone of our constitution, that—
 “the Church^f of England shall be free and shall have all her whole rights and liberties inviolable,”²—should, from surrounding circumstances, have been most scrupulously respected, a change, by no means in accordance with that principle, was effected by 25 Hen. VIII. c. 19. It was by the above statute enacted that the course of appeals should be the same as that laid down in the Act^g of last year, but with this remarkable addition, that the Archbishop’s Court should not be final as then settled, but that a further appeal should thenceforward lie to the King in Chancery, and that—

^f Magna Charta, i.

^g 24 Hen. VIII. 12.

^h 25 Hen. VIII. 19. 4.

“Upon^h every such appeal a Commission shall

² “Ecclesia Anglicana libera sit, et habeat omnia jura sua integra et libertates suas illæfas.”

be directed, under the Great Seal, to such persons as shall be named by the King's highness . . . to hear and definitively determine such appeals . . . and that such judgment and sentence . . . shall be good and effectual and also definitive, and no further appeals to be had or made from the said Commissioners for the same."

CHAP. III.

By this clause was established a new and hitherto unheard-of authority for the purposes in hand, namely, the Court of Delegates. After decision in the Archbishop's Court, the cause might now be signified to the Crown in Chancery, and a Commission thence issued by the Lord Chancellor or Keeper, under the sign manualⁱ of the King; and the persons so appointed were "commonly called^k Delegates," on account of the special "delegation^l they receive from the Prince for the hearing and determining every particular case." Thus, an authority which was in this age of our history formally withdrawn from the Pope, King Henry VIII. greedily endeavoured to grasp

ⁱ Gib. Cod.
1082.

^k Ibid.

^l Ibid.

CHAP. III. for himself. Nor is it much to be wondered at that he succeeded in his enterprise, and prevailed with his Parliament to confer on him this new and strange power, in times when that body was fervile enough to enact^m that royal proclamations should override statutes of the realm, and was contemptible enough to submit tamely to the insult of being told by their sovereign, among other sneers, that they were "not to be judges" of their own fantastical opinions and vain expositions."

^m 31 Hen.
VIII. 8.

ⁿ Conc.
Mag. B. 3.
872.

IV. *Court of Delegates.*

HERE, then, we have arrived at another important step in the course of our inquiry, the establishment of the Court of Delegates; a Court which, from the year 1534, statutably received appeals from the Courts of the Archbishops, and so placed the final decision of all ecclesiastical causes (save those touching^o the King;

^o 24 Hen.
VIII. 12. 9.

which remained as before, and still remain^p with the Upper House of Convocation) in the hands of nominees of the Crown, appointed for the special case in hand. It is here observable that no court of specified individuals was now established, but only that a power was given to the Crown of appointing persons to hear any particular case *pro hac vice*; a most undesirable mode of proceeding, and one which has slender grounds of recommendation. Indeed, so far as the statute is concerned, the Crown might have nominated as judges persons notoriously hostile or friendly to one of the parties in the case; and further, though spiritual causes were contemplated, it was not statutably necessary that one single spiritual person should be a member of the Court. But however contrary to the natural reason of things and the general tenor of our constitution in Church and State, as specifically laid down in the statute of appeals,^q this

CHAP. III.

p 25 Hen.
VIII. 19. 3.

q 24 Hen.
VIII. 12.

CHAP. III. may appear, yet such was the effect of
 the Act^r which constituted the Court of
 Delegates as the final resort in Causes Ecclesiastical. As a fact, however, notwithstanding the power vested in the Crown of appointing laymen upon this Court, "there are no footsteps^s of any of the nobility or Common Law Judges in Commission till the year 1604 (*i. e.* for seventy years after the erecting of the Court), nor from 1604 are they found in above one commission in forty, till the year 1639, from whence (*i. e.* from the downfall of bishops and their jurisdiction which ensued) we may date mixtures in that Court."

^r 25 Hen.
VIII. 19. 4.

^s Gib. Cod.
xxi. citing
Reg. Offic.
Cur. Dele-
gat.

V. *A Digression on Courts of Review, Star Chamber, and High Commission.*

HAVING now, in the prosecution of our inquiry, arrived at the establishment of the Court of Delegates in 1534, a Court of final Ecclesiastical Appeal which existed

for 298 years, that is, from 1534 down to the year 1832, it may be useful to pause in our inquiry into the point directly before us, in order to make a brief digression. That digression will not embrace subjects absolutely essential to our present purpose; still, for a full elucidation of the matter in hand, they ought to be briefly glanced at.

CHAP. III.

Court of Review.

ON some occasions after a cause had been decided by the Court of Delegates above mentioned, the Crown granted what has been termed a "Commission of Review" to revise the sentence. It has been said that this was a Commission which the King might "grant as Supreme^t Head to review the definitive sentence given on appeal in the Court of Delegates." And the following specified reasons have also been given for the exercise of this power by the Crown. "1. *Because*^u it is not

^t Jacob, Law Dict. sub tit. Appeal to Rome; Vid. Gib. Cod. 1083.

^u Gib. Cod. 1083; Coke Inst. 4. 341.

CHAP III. *restrained by the statute. 2. For that after a definitive sentence the Pope, as Supreme Head by the Canon Law, used to grant a Commission ad Revidendum. And such authority as the Pope had, claiming as Supreme Head, doth of right belong to the Crown, and is annexed thereunto by the statutes 26 Hen. VIII. c. 1. and Eliz. 1. c. 1.*"

In conformity with such reasoning, which, for many reasons, is by no means admitted as convincing, this Court of Review has at times been put in motion, and certainly on occasion with rather odd effect. For instance, "The Dean of Wells^x was deprived of his deanery by the Commissary of the Bishop of Bath and Wells. From this sentence the Dean appealed first to the Archbishop, who affirmed it; and secondly exhibited an appeal to the King in Chancery, but found no relief there, for the King granted the deanery to one Turner. However (Anno 1 Mar.) the deprived Dean obtained another Com-

^x Dyer, 273.

mission to the Delegates, and by their sentence was restored to his deanery; and then, lastly, after the death of Queen Mary (1 Eliz.), Turner had a Commission of Review, and he was in turn restored. Again,⁷ in the 39th Queen Elizabeth, a party against whom sentence was given appealed to the Archbishop, who affirmed the judgment; then an appeal was made to the Court of Delegates, who reversed both the former sentences, on which the Crown granted a "Commission ad Revidendum," the decision of the Court of Delegates.

CHAP. III.

⁷ Jacob, Law
Dict. sub tit.
Appeal to
Rome.

Such was the "Court of Review." To an unprofessional mind it is somewhat difficult to comprehend how a commission authorizing this tribunal could ever have been constitutionally granted by the Crown, with power to reverse a decision of the Court of Delegates, when it is remembered that the statute establishing the latter Court is couched in this language:—

CHAP. III.
 * 25 Hen.
 VIII. c. 19.
 s. 4.

"Such² judgment and sentence as the said Commissioners shall make and decree in and upon any such appeal shall be good and effectual and also definitive, and no further appeals to be had or made from the said Commissioners for the same."

Now, if there is any truth in the principle, "Rex intra leges non ultra leges," to a common understanding it would appear from the foregoing enactment that the decision of the Court of Delegates was statutably final, and therefore could not be disturbed by any new intervention of the Crown. However, such was not the view taken by legal authorities of considerable eminence, when this question was debated at certain conjunctures of our national history. The reasons which appear to have satisfied the professional mind, that a review of judgments in the Court of Delegates could be constitutionally granted, have been adverted to above,^a and may be seen more fully expressed at page 1083 of Gibson's Codex.^b The arguments, however, relied on, when

^a Pp. 47, 48.

^b Citing Inst. 341; Littl. 232.

divested of all decoration, amount to this, that the word "*definitive*" in the statute^c does not mean "*final*;" and that the clause thus worded, "*no further appeals to be had or made from the said Commissioners*" does not exclude a fresh hearing of the case. The canons of interpretation applied to the English language for obtaining these results are not specified. However, in the reigns of King James I. and King Charles I, either from a desire to extend the royal prerogative or from some darker reason, this interpretation seems to have commended itself to the acceptance of the learned in Westminster Hall. Whether it would meet with an equally favourable reception within those precincts in the present day it does not become one of my profession to hazard an opinion. One thing however, at least, is clear enough, and it is this, that outside those walls it would certainly fall short of giving any satisfaction whatsoever.

CHAP. III.

^c 25 Hen.
VIII. 19. 4

Abolishment of Court of Review, Star Chamber, and High Commission.

CHAP. III. HOWEVER, it is hardly necessary to speculate on the subject, for this Court of Review has, by 2 & 3 Will. IV. c. 92. s. 3, beyond controversy, been consigned irrecoverably to the same limbo as the Courts of Star Chamber and High Commission, the one owing its existence, at least in its later form, to King Henry VII, the other initiated by 1 Eliz. c. 1. s. 18. Into their history, their proceedings, and their mysterious relations with the Privy Council it would be out of place just at this moment to inquire. It is sufficient for our present purpose to know that the Star Chamber and the Court of High Commission are no more. The former was annihilated by 16 Car. I. c. 10. sec. 3. The power to appoint the latter was specially "annulled,"^d revoked, annihilated, and utterly made void for ever," by 16

Gib. Cod.
6.

Car. I. c. 11. s. 3. And, moreover, it was enacted^e by the same statute, that, from and after the first day of August, 1640,—

CHAP. III.

^e Gib. Cod 57.

“No new Court^f shall be erected, ordained, or appointed within this realm of England, or dominion of Wales, which shall or may have the like power, jurisdiction, or authority, as the said High Commission Court now hath or pretendeth to have; but that all and every such Letters Patents, Commissions, and Grants made or to be made by his Majesty, his heirs, or successors, and all powers or authorities granted, or pretended or mentioned to be granted thereby, and acts, sentences, and decrees to be made by virtue or colour thereof, shall be utterly void and of none effect.”

^f See 5.

And though, at the restoration of the royal family, the statute of Queen Elizabeth,^g which had originally established the High Commission Court, was again revived by 13 Car. II. 12, yet two clauses^h were specially introduced to bar any revivalⁱ of that Court itself. And further, still later on in our national annals, when

^g 1 Eliz. 1.

^h 13 Car. I. 12. 2. & 3.

ⁱ Gib. Cod 58.

CHAP. III.

1 Will.
ar. c. 2.
36.

King James II. had, by an illegal and unconstitutional renewal of High Commission powers, outraged the rights of the University of Oxford, the legislature again declared formally by statute,^k “*That the Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other Commissions and Courts of like nature are illegal and pernicious.*” To this hour these statutable determinations of the English legislature meet in many quarters with hearty approval and unqualified assent. And it is certain that the High Commission Court, the Star Chamber, and the Court of Review have all thus received at least apparent death-blows, from which it is most earnestly to be hoped that there may be no recovery.

VI. *Change in the Law of Final Appeal.*

REVERTING now from the foregoing digression, not absolutely essential to our subject, (for the Court of Review was

unstatutable and those of Star Chamber and High Commission were Courts of first instance rather than of appeal,) but still touching on matters connected with it, it must be remembered that, for receiving appeals from the Archbishops' Courts in the last resort, the Court of Delegates was established¹ in 1534. From that date this Court lasted, as before said, through a long period of our national history, extending down to the year 1832. In the last-named year, however, a remarkable change was again made in the law of Final Ecclesiastical Appeal—a change which was not effected without previous consultation and advice. The very slender effect which that consultation and advice had upon subsequent legislation on this subject the sequel will show.

¹ 25 Hen III. 19. 4

First Commission for recommending a New Court of Final Appeal.

In the year 1831 a Commission, including the names of Archbishop How-

3AP. III. ley, the Bishops of London, Durham, and S. Asaph, Chief Justices Tenterden and Tindal, Sirs John Nicholl, Christopher Robinson, Herbert Jenner, and Dr. Lushington, reported that "*the Privy Council, being composed of Lords Spiritual and Temporal, the Judges in Equity, the Chiefs of the Common Law Courts, the Judges of the Civil Law Courts, and other persons of legal education and habits, who have filled judicial situations, seems to comprise the materials of a most perfect Tribunal for deciding appeals from the Ecclesiastical Courts.*" And here it is observable that one of the reasons specified for commending the Privy Council, as comprising materials of a most perfect Tribunal for deciding Ecclesiastical appeals, was this—that it is partly composed of Lords Spiritual. Thus it must be fairly assumed that the Most Reverend, Right Reverend, and learned persons, of whom this Commission was composed, did not exclude

from their consideration the desirableness of having at least the assistance of some spiritual judges in deciding spiritual causes. However, as we shall see in the final event, such assistance was entirely dispensed with, so far as the requirements of the consequent legislation prevailed. And thus the commendation of the Commissioners on this head was wholly ignored.

*Second Commission on the foregoing
Subject.*

IN the following year, 1832, the report of a second Commission, signed, among others, by the Archbishop of Canterbury, the Bishops of London, Durham, Lincoln, S. Asaph, and Bangor, the Chief Justices Tenterden, Wynford, Tindal, Sirs John Nicholl, Christopher Robinson, Herbert Jenner, and Dr. Lushington, adopted the views of the previous Commission, and recommended that Ecclesiastical appeals in the last resort should be transferred

CHAP. III. from the Court of Delegates to the Privy Council.

VII. *Abolishment of the Court of Delegates.*

THE foregoing recommendation was speedily acted upon; for on the 7th of August, 1832, the statute 2 and 3 Will. IV. c. 92, became the law of the land, by which the Court of Delegates was abolished,^m and the jurisdiction previously exercised by it was conferred on the Privy Council.

VIII. *Jurisdiction of Court of Delegates transferred to Privy Council.*

THE above-mentioned Act, after having recited, among other matter, that part of the statuteⁿ of King Henry VIII. constituting the Court of Delegates, proceeded to enact as follows:—

^o 2 & 3 Will. IV. c. 92. s. 3. “And^o be it further enacted, that, from and after the first day of February, 1833, it shall be lawful to and for every person who might heretofore, by virtue


of either of the said recited Acts, have appealed or made suit to his Majesty in his High Court of Chancery, to appeal or make suit to the King's Majesty, his heirs or successors, in Council, within such time, in such manner, and subject to such rules, orders, and regulations for the due and more convenient proceeding as shall seem meet and necessary, and upon such security, if any, as his Majesty, his heirs and successors, shall from time to time by order in Council direct. And that the King's Majesty, his heirs and successors, in Council, shall thereupon have power to proceed to hear and determine every appeal and suit so to be made by virtue of this Act, and to make all such judgments, orders, and decrees in the matter of such appeal or suit as might heretofore have been made by his Majesty's Commissioners, appointed by virtue of either of the hereinbefore recited Acts, if this Act had not been passed. And that every such judgment, order, and decree so to be made by the King's Majesty, his heirs and successors, shall have such and the like force and effect in all respects whatsoever as the same respectively would have had if made and pronounced by the aforesaid High Court of Delegates. And that every such judgment, order, and decree shall be final and definitive. And that no Commission shall hereafter be granted or authorized to review any judgment or decree to be made by virtue of this Act."

Thus in causes Ecclesiastical the final

CHAP. III. appeal to the Crown in Chancery was annihilated, the Court of Delegates thence appointed was abolished, and the jurisdiction, now withdrawn from Chancery, was conferred on the Crown in Council, to be thenceforward exercised by the Privy Council, subject to such rules and regulations as his Majesty by order in Council should direct.

IX. *Relations between Star Chamber and the Privy Council.*

Now the relegation of Ecclesiastical appeals in the last resort to the Privy Council has not altogether an encouraging aspect, especially when the mysterious relations between that body and the notorious Court of Star Chamber in times past are called to mind. In real truth, this last-mentioned Court, by those who have investigated the subject most carefully, is considered to have been the Privy Council under another name. Doubtless the origin and powers



of the Star Chamber are somewhat obscure; some asserting that its jurisdiction was merely the original jurisdiction of the King's Council; others referring its modern authority entirely to the statute 3 Hen. VII. At any rate, in the time of James I, when it was in full activity, the learned in the law could hardly reconcile their disputes^p on the subject, and even Plowden was pronounced in error. Its very name is shrouded in some mystery. Its eulogist, Hudson, denies the ordinary derivation assigned. "The Camera Stellata," he tells us, "is most aptly named,^q not because the Star Chamber where the Court is kept is so adorned with stars gilded, for surely the chamber is so adorned because it is the seal of that Court." And then he adds, "The stars have no light but what is cast upon them by the sun, being his representative body; and as his Majesty was pleased to say, when he sat there in his royal person, representation

CHAP. III.

^p Arnold,
Prize Essay,
1860, p. 46.

^q Ibid. p. 47.

CHAP. III. must needs cease when the person is present, so in the presence of his Great Majesty, the which is the sun of heaven's glory, the shining of these stars is put out ; they not having any power to pronounce any sentence in this Court, for the judgment is the King's only." However, notwithstanding this courtly compliment, the account rejected by Hudson is probably true ; for the Court of Star Chamber, as its records prove, is the Privy Council meeting in the "Starred Chamber," so called in all likelihood from the decorations of stars with which its ceiling was emblazoned. The history of the name has at least this importance, of being an indication that the Court of Star Chamber was nothing more or less than the Privy Council exercising judicial functions ; and it certainly would be no matter of surprise if, in some ears, the revival of those functions should awaken unwell-

come echoes of the past, and tell forth signal warnings of extreme alarm. CHAP. III.

X. Privy Council too ungainly a Body to wield the Power now assigned to it.

BUT, to waive all sentimental objections, on the score of past history, to the relegation of Ecclesiastical causes in the last resort to the Privy Council as a body, it is beyond all question clear that it was far too large and heterogeneous an assembly to wield with any satisfaction, as an integral Court, the jurisdiction now assigned to it by the statute of 1832;[†] and, indeed, our legislature, by its subsequent proceedings[‡] in 1833, acknowledged the fact. In truth, this incapacity had been previously discovered by earlier experience; for the appeals carried thither from India[†] and the Colonies had before this time been heard by a Committee of the Council, which made reports, upon which which final de-

[†] 2 & 3 Will.
IV. c. 92.
[‡] 3 & 4 Will.
IV. c. 41.

[†] Preamble
3 & 4 Will.
IV. c. 41.

CHAP. III. termination in Council was given. We have, however, now to consider the effect of a specific statute, not to speculate upon any practice or usage which previously prevailed. The power at this time given by statute to the whole Council to hear Ecclesiastical appeals, subject to "such orders and regulations" as the Council itself should adopt, might, under the very terms of the Act of Parliament, have been exercised in the most exceptionable manner; and a return to some managements was now statutably rendered possible, which have impressed on the pages of our past history records of the most odious tyranny.

The unwieldy size of the Council, as well as its heterogeneous elements, necessarily unfitted it, as was said, for the functions now assigned to it; for its very capacious boundaries have in later times been extended until it has embraced a vast multitude of persons, varying in rank, pro-

fession, character, qualifications. There is no unity whatever in the elements of which it is composed. In truth, commonly the strongest claim for admission into that august body is the fact of being antagonistically opposed on great state questions to those who have last received the honour of appointment. Had the Privy Council retained somewhat of its ancient size, constitution, and qualifications, it might have been less unfit to exercise the judicial functions now confided to it; but the changes which have passed over it have prevailed to change its whole character.

In early times the Privy Council consisted of a small body appointed to advise the Crown; but it gradually increased, and in King Edward VI.'s reign its number amounted to forty persons.^u In the reign of King Charles II. it became so numerous that, to quote from his own declaration, it was "unfit for the secrecy and

^u Burn. Ref.
vol. ii. pt. ii.
p. 121.

CHAP. III. dispatch that are necessary in many great affairs." Impressed with this conviction, that monarch formed a Special Committee,^v or (to use a term adopted in his father's reign) a "Cabinet," to which alone the secrets of state policy were confided. Thenceforth the action of the whole Privy Council as a body ceased. In fact, King Charles II.'s own words, in the Royal Declaration of 1679, pretty clearly describe the reason and the effect of this change:—" *His Majesty*," were his words to the Councillors, "*thanks you for all the good advices you have given him, which might have been more frequent if the great number of this Council had not made it unfit for the secrecy and dispatch that are necessary in many and great affairs. This forced him to use a smaller number of you in a foreign Committee (the Cabal³), and*

^v Arnold,
Prize Essay,
1860, p. 65.

³ In 1671, Clifford, Arlington, Buckingham, Ashley, and Lauderdale were the Committee appointed. The initials of their names give the word.

sometimes the advices of some few among them upon some occasions for many years past." CHAP. III.

Thus what we now call the Cabinet, a body really unknown to the English constitution, really grew out of the Privy Council; but the change was not effected without a struggle, nor was the Privy Council divested of its active functions without an endeavour to retain its ancient authority; for Sir William Temple devised a scheme for combining the old system of government by a Council with the modern plan of government by a Cabinet, composed of the Parliamentary notabilities of the day. By his scheme the Council was made to consist of thirty persons. Three principles were to govern the appointments. 1. The Council was, as asserted, to embrace a representation of the chief interests of the realm. Thus the Bishops were "to take care of the Church;" the Lord Chancellor and Chief Justice were

CHAP. III. “to inform the King well of what concerns the laws.” 2. There was to be an accession of powerful members of Parliament. 3. The Council was to derive weight from the collective amount of property belonging to its members. This last principle seems to have been adhered to in carrying out the plan with considerable tenacity, as the personal wealth of those who composed it was calculated to have amounted to 300,000*l.* a-year—a tolerably large share of the goods of this world for thirty individuals. Now, had this scheme succeeded, the country would have been in a fair way of groaning under that most detestable of all detestable forms of government—an oligarchy, and that, too, an oligarchy deriving its authority, at least in part, from that vulgarest of all vulgar qualifications, the possession of money. Happily this plan of Temple, though eulogized as “a” thing fallen from heaven into his Majesty’s heart,” ap-

^w Temple’s
Memoirs, p.
233.

proved by Sunderland, and lauded fantastically by Essex, signally failed. It was stifled in its birth; Temple himself strangling his own progeny by consenting to form part of a Council within the Council.

The interest of this passage in history consists in this, that it seems to mark the transition from government by the whole Privy Council to government by a Cabinet; for, from 1679, no idea has been entertained of making all Privy Councilors responsible for the political acts of the Crown. The whole Council has, indeed, as a matter of formality, been sometimes convened, as, for instance, on the occasion of the signature of the Peace of Utrecht; but this useless form is now abandoned. In proportion, however, as the political functions of the Privy Council have decreased its bulk has been augmented; and though, figuratively viewed, it may be charged with important powers, it is

CHAP. III. in its entirety never called upon to exercise any; and is, in reality, composed of a somewhat confusing and heterogeneous list of names, among which may be found those of some persons who have taken but little part in public business, are likely to take less, and are now qualified to take none.

However, this very large and somewhat anomalous body of persons it seemed fit to our legislature, in 1832, to constitute, by statute, as the tribunal for hearing, among other causes, Ecclesiastical Appeals in the last resort. The very sensible alarms which our ancestors felt, and oftentimes* expressed, at the exercise of judicial functions in that neighbourhood, seem to have passed away. And, moreover, considering the effect of the judgments which the Privy Council was called upon to pronounce, very slender regard appears to have been paid to the previously expressed unwillingness of the

* 16 Car. I.
10; 1 Will.
& Mary, 2.
36.

English legislature to recognize that body as a Court of Justice, an unwillingness declared in these very intelligible terms:—

CHAP. III.

“ Be it likewise declared and enacted . . . that neither his Majesty nor his Privy Council have or ought to have any jurisdiction, power, or authority by English bill, petition, articles, libel, or any other arbitrary way whatsoever to examine or draw into question, determine, or dispose of the lands, tenements, hereditaments, goods, or chattels of any the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary Courts of Law.”

7 16 Car. 1
c. 10. s. v.

Still, notwithstanding the unwillingness of our ancestors to confide judicial functions to the Privy Council, notwithstanding its total unfitness, in its entirety, to exercise such functions, from its unwieldy size, and in the main from its component parts, it was, as before said, statutably constituted by the legislature,² in 1832, as the Ultimate Court of Appeal in Spiritual Causes among others. And here, then, we have come to another resting-place in

² 2 & 3 Will
IV. c. 92.

CHAP. III. our journey, and find the whole body of the Privy Council statutably erected into the Final Court of Ecclesiastical Appeal, subject only to such "rules,^a orders, and regulations" as the Crown shall "by order in Council direct." And here the reader may well pause to consider the magnitude of the change effected, the unfitness of the body, as a whole, charged with these fresh and surprising powers, the slender amount of regard paid to sensible warnings of our earlier history, and the slight respect shown to previous determinations^b of the national legislature.

^a 16 Car. I.
c. 10, 11;
^b 3 Car. II.
. 12; 1 Will.
& Mary, c. 2.

XI. Fresh Alterations in the Constitution of Court of Final Ecclesiastical Appeal.

To proceed. The English legislature seems to have soon discovered that it had confided appeals in the last resort to a very unsatisfactory, and it may be said, if advantage in management had been taken of some provisions in the statute,

a most dangerous tribunal. And so, desirous to correct this confessed shortcoming, our legislators proceeded in the very next year, 1833, to make another change in the law. From that change is dated the existence of the present Court of Final Ecclesiastical Appeals. But the legislative mismanagement which then occurred is worthy of some lengthened remark and of careful consideration.

XII. Transference of Appeal from the Privy Council to a Judicial Committee.

ENDEAVOURING to correct the shortcomings of 1832, the legislature enacted, in 1833, the statute 3 & 4 Will. IV. c. 41, by which a Court denominated the Judicial Committee of Privy Council was substituted in the place of the Privy Council itself for hearing appeals. That Committee is the present statutable Court of ordinary Final Ecclesiastical Appeal, and consists of the persons specified in a former passage.^c

^c Vide sup.
pp. 25, 26.

XIII. *The Legislature here acted*
"per incuriam."

CHAP. III. Now it must be confessed that the legislature at this time was guilty of some grievous error or oversight. It is impossible to believe that it meant to do what it did. One cannot force oneself to the belief that it intended to refer ecclesiastical appeals, along with others of a totally different character, to the Judicial Committee of Privy Council as now constituted, though such was the effect of its enactments.^d For if it did so intend, how came it to pass, in the first place, that, in detailing the names of the Courts whence causes should be carried to the Judicial Committee on Appeal, the Ecclesiastical Courts were never mentioned at all in the enacting clauses of the statute?^e They specify the Courts of Admiralty, the Vice-Admiralty^f Courts, the Courts in the plantations of America, and *other* his Majesty's dominions abroad, the

^d 3 & 4 Will.
IV. 41.

^e Ibid.

^f Sec. 2.

Courts of Sudder Dewanny Adawlut,^g in the three presidencies of India, designating each severally by name, the Courts of Judicature to the eastward^h of the Cape of Good Hope. But not one word is there mentioned of any one Ecclesiastical Court of England, nor is the slightest reference there made to any appeal of spiritual contention. It is really a most unpardonable omission, under the present supposition, that a large branch of judicature of the most solemn character should have been never even hinted at in the specified detail if there was a deliberate intention of including it. This would, indeed, argue a most careless and inexhaustive method, by no means creditable to any legislative composition, and indeed altogether incomprehensible.

CHAP. III.

g Sec. 22.

h Sec. 24.

And, in the second place, if there was a deliberate intention to commit spiritual appeals in the last resort to this Judicial Committee, how comes it to pass that not one single spiritual person was by the

CHAP. III. statute placed upon it? And this omission, too, in the very face of the recommendation of the commissions which had reported on the subject of the transference of spiritual appeals from the Court of Delegates in the years 1831 and 1832. Those commissions had reported that "the Privy Council seems to comprise the materials of a most perfect tribunal for deciding appeals from the Ecclesiastical Courts," for this reason, among others, that it was partly "composedⁱ of lords spiritual." Yet the spiritual element in selecting the members of the Judicial Committee, as now specified, was entirely ignored. It was to consist, as we have seen, of the President of the Privy Council^k and such members of it as should hold the offices of Lord Chancellor, Lord Keeper, Chief Justice of the King's Bench, Master of the Rolls, Vice-Chancellor of England, Chief Justice of the Common Pleas, Chief Baron of the

ⁱ Pp. 53-57.
sup.

^k 3 & 4 Will.
IV. 41. 1.

Exchequer, Judge of the Prerogative Court of Canterbury, Judge of the High Court of Admiralty, Chief Judge in Bankruptcy, together with such members of the Privy Council as are ex-Presidents, ex-Lord Chancellors, or as have held any of the other afore said offices. Now, is it for one moment to be believed that our statesmen, at the time under consideration, so far disregarded the advice of the Commissioners who had reported on the matter in hand, so far forgot their duty to God and the Church, and so completely set all precedent, reason, and propriety at defiance as considerately and intentionally to assign appeals in the last resort, on spiritual matters of faith and doctrine, to a body of men among whom not one single spiritual person appears? This is, indeed, altogether incredible. It is manifest that to entertain such a supposition would be exceedingly unjust to the memory of our legislators of that day, and would be an

CHAP. III. unreasonable imputation upon them, to say the least, of most reckless negligence or scandalous impropriety.

The truth is that the legislative mind was so pre-occupied with the Admiralty, Vice-Admiralty, Colonial and Sudder Courts, and the manner of their appeals, that the question of the Ecclesiastical Courts, at least so far as it involved matters of doctrine (as has been admitted by an eminent legislator engaged in the transactions), was *per incuriam* overlooked while the legislation,¹ which finally constituted the Judicial Committee of Privy Council as an appellate Court of judicature, was passing through its various stages. Lord Brougham himself said, when speaking of the "Gorham" case,^m "He could not help feeling that the Judicial Committee of Privy Council had been framed without the expectation of questions like that . . . being brought before it. It was created for the consideration of a

¹ 3 & 4 Will.
IV. 41.

^m Hans. 3 S.
vol. III,
p. 629.

totally different class of cases, and he had no doubt but that if it had been constituted with a view to such cases as the present, some other arrangements would have been made." And so, though in the preamble of 3 & 4 William IV. 41. Ecclesiastical appeals are certainly mentioned, yet by the time the enacting clauses were arrived at the subject had slipped from memory; and such appeals never would, in fact, have passed to this tribunal but for some very capacious and wide terms undistinguishingly introduced into the 3rd section of the statute. Those terms were by no means intended to secure the anomalous effect in regard to appeals involving spiritual questions which is so deplorable, but rather originated in that unfortunate love of verbiage which often prevails among those learned persons who are charged with the duty of drafting Acts of Parliament. The words are as follow :—

CHAP. III.
" 3 & 4 Will.
IV. 41. s. 3.

" Andⁿ be it further enacted, that all appeals or complaints, in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before his Majesty, or his Majesty in Council shall, from and after the passing of this Act, be referred by his Majesty to the said Judicial Committee of his Privy Council."

Now, there are among others two serious faults in composition, and those faults are specially to be avoided where weighty interests are concerned, as in the case of drafting Acts of Parliament. One is to write inexhaustively, the other to use terms over-capacious in their grasp; and certainly the person who drafted this Act, and the legislators who subsequently sanctioned it, cannot escape one of the horns of this dilemma. If there was any intention to include the Ecclesiastical Courts, the method is sadly inexhaustive in failing to specify those Courts among the others detailed. If, on the other hand, there was no such intention, then these undistinguishing terms of the 3rd section, which

are so wide as to include those Courts, are discredibly over-capacious in their grasp. The latter alternative is the true one ; and the fact is that, "*per incuriam*," that most important branch of judicature, which governs decisions on faith and doctrine in the last resort was consigned to the Judicial Committee of Privy Council, statutably a purely lay tribunal, by addition to excessive verbiage. The Church of England has here serious and just matter of complaint, to which no reasonable person can turn a deaf ear.

XIV. *Clumsy Attempt of the Legislature to remedy the "Incuria" before mentioned.*

SEVEN years after the afore-mentioned legislative oversight had occurred, entailing the most serious consequences on the Church of England, and establishing a tribunal for the purposes under consideration neither fitted for the functions assigned to it, nor in harmony with the

CHAP. III. constitutional compact between Church and State, an attempt was made to remedy this most unfortunate and deplorable mishap; but the enterprise has complicated matters, and, in a constitutional point of view, done more harm than good. In the year 1840, by the Clergy Discipline Act (3 & 4 Vict. c. 86. s. 11.) it was enacted,—

“That every Archbishop and Bishop of the United Church of England and Ireland, who now is, or at any time hereafter shall be, sworn of her Majesty’s most Honourable Privy Council, shall be a member of the Judicial Committee of Privy Council for the purposes of every such appeal as aforesaid (*i. e.* in causes commenced under the recited Act). And that no (such) appeal shall be heard before the Judicial Committee of the Privy Council unless, at least, one of such Archbishops or Bishops shall be present at the hearing thereof.”

Now, from this last sentence it is clear beyond controversy that the Legislature had by this time discovered the unsatisfactory character and results of its former Act, in remitting spiritual causes in the

last resort to a tribunal in which, statutably, no spiritual person had a seat; and so it endeavoured, so far forth as the present statute was concerned, to amend that error by forbidding the Judicial Committee to hear an appeal in any cause commenced under its provisions without the addition, at the least, of one spiritual member to its body. However, it must be said that this partial cobbling in constitutional matters is seldom commendable; and especially in this case, that it affords a specimen of a most clumsy attempt at a compromise, and entails results little creditable to our system of judicature. In the first place, to a Court thus constituted of mixed elements, lay and spiritual, there are many objections well known to those who have paid attention to such matters, and considered by them of great weight. Into these, however, it is not necessary at this moment to enter. But secondly, a very simple and palpable objection, intelligible to all men,

CHAP. III. exists to this management. Two distinct Courts of final appeal are thus statutably constituted for the same causes. One the Judicial Committee of Privy Council, as specified by the statute 3 & 4 William IV. 41, a purely lay tribunal; the other a mixed Court, composed of the aforesaid Committee, with the addition of the spiritual element specified in 3 & 4 Vict. c. 86. And thus these two distinct tribunals are statutably erected to decide on causes in themselves identical. The fact which decides the question as to which of these separate final appeal Courts shall hear the cause is only the form of the legal proceedings in the case. If they are commenced under the Clergy Discipline Act, the appeal is to the latter tribunal; if in any other way, to the former. Now that these two distinct appeal Courts should exist concurrently under such circumstances has an odd aspect; and, irrespective of any grounds of complaint

which the Church may have on the subject, it may with some confidence be left to the judgment of any one, who has a regard for the proprieties of English judicature, to say whether such a state of things is in any way creditable to our country.

CHAP. III.

XV. Recapitulation.

HAVING now given an historical outline of the legislation by which the present state of "the Courts of final appeal in matters Ecclesiastical" has been brought about, it may be well, before proceeding to the next division of the subject, to set down a condensed recapitulation of the changes which have from time to time taken place.

1. In 1164 the eighth Constitution of Clarendon, in accordance with previous usage, declared that the Archbishop's Court^o should be here the Court of final appeal, and that no appeal should be taken further, *i. e.* to Rome, without Royal af-

^o Spelm.
Conc. 2. 63

- CHAP. III. sent. 2. In 1533 the Legislature enacted^p that this permissive appeal to Rome should be taken away, and that the Archbishop's Court should be the last resort in ordinary cases, and the Upper House of Convocation^q in such as touched the King. 3. In 1534 it was enacted^r that from the Archbishop's Court there should be an appeal to the Crown in Chancery, whence was appointed the Court of Delegates,^s to give definitive judgment. 4. The Courts of Review, Star Chamber, and High Commission existed concurrently for some time with the Court of Delegates. They were not, however, statutably constituted as appeal Courts, and have all been statutably abolished.^t 5. In 1832 the Court of Delegates was annihilated,^u and an appeal from the Archbishop's Court given to the Crown^x in Council, *i. e.* to the whole Privy Council. 6. In 1833 the Judicial^y Committee of Privy Council was substituted instead of the Privy Council itself.
- ^p 24 Henry VIII. 12. 6.
- ^q Sec. 9.
- ^r 25 Henry VIII. 19. 4.
- ^s Ibid.
- ^t 16 Car. I. 10; 16 Car. I. 11; 2 & 3 Will. IV. c. 92. s. 3.
- ^u 2 & 3 Will. IV. 92. s. 1.
- ^x Ibid. s. 3.
- ^y 3 & 4 Will. IV. 41. 1.

7. In 1840 a mixed tribunal, composed of the Judicial Committee of Privy Council and some specified prelates, was constituted² to hear appeals from the Archbishop's Court, in case the proceedings were commenced under a particular Act,^a but not otherwise.

CHAP. III.

² 3 & 4 Vict.
86. 16.

^a Ibid.

The foregoing is a summary of the changes which have been made here in the constitution of Courts of final appeal in causes Ecclesiastical. Those Courts are at this moment three.

I. The Upper House^b of Convocation, in cases touching the King.

^b 24 Henry
VIII. 12. 9.

II. The Judicial Committee of Privy Council united^c with some specified prelates, in cases commenced under a special statute.^d

^c 3 & 4 Vict.
86. 16.

^d Ibid.

III. The Judicial Committee of Privy Council^e in ordinary cases.

^e 3 & 4 Will.
IV. 41. 1.



CHAPTER IV.

JUST GROUNDS OF COMPLAINT AGAINST THE PRESENT ORDINARY COURT OF FINAL APPEAL.

I. Present Law prescribes Three Courts. Considerations now confined to one only.

CHAP. IV.



IT is clear that under the present law the three Final Appeal Courts, described at the end of the last chapter, are now statutably established in England. And this is by no means a satisfactory system, that for causes identical in subject-matter there should be three totally distinct and dissimilar Courts to which application may be made, under varying circumstances, in the last resort. However, to waive, in the future discussion of the subject,

this cause of dissatisfaction, and to pass over some grave objections which might be suggested against the two first Courts established for special cases, 1. the Upper House of Convocation, and 2. the Judicial Committee of Privy Council united with some specified prelates; attention will henceforth be directed exclusively to the third or ordinary Court of Final Ecclesiastical Appeal, constituted by the Act of 1833, *i. e.* the Judicial Committee of Privy Council, pure and simple. And some grounds of complaint against that Court will now be pointed out, no account of course being taken of the acknowledged makeshift by which spiritual prelates have been on occasion called in to advise.

II. *No Sufficient Security for Doctrine under the present System.*

Now the first just ground of complaint against that Court is that there is no sufficient security for the maintenance of true doctrine.

CHAP. IV. And here it is perhaps hardly necessary to say, what is fully admitted on all hands, that the object and duty of a Court are not to make doctrine, but to apply doctrine already settled to the particular case under view. "The Judicial Committee,"

^a Hans. 3 S.
vol. III,
p. 643.

in Lord Campbell's words,^a "was merely a Court of construction. Its duty was to explain the meaning of legal documents." These are facts universally allowed, and which have been frequently declared also by the Court itself. The framers of doctrine for any national Church certainly are not Courts, but the Synods of that Church. The Liturgy, Articles, and Canons of the English Church are the exponents of her doctrine, and they have been framed by her Synods. And this is the very footstone of the compact between Church and State: that the code thus framed and subsequently accepted by the civil power is the law which every Court in this country *has to apply* in questions of doctrine to each

case submitted to its judgment. To use the words of an eminent and accomplished member of the Court, uttered in my hearing, with reference to writings charged with heresy, "It is for the Court to decide whether the passages are consonant or not with 'the Articles.' . . . That is the function of the Court and cannot be delegated." Now these facts being admitted, and I suppose no one of competent information will deny them, it has been said, if the Court has only to apply doctrine already framed to the case in hand, and not to frame new doctrine, that no insecurity in this respect is entailed by the present system.

But to this proposition it is upon consideration no way possible to assent. For though the Court is, as all admit, not charged with the power of making new doctrine, the practical effects of its decisions may be to do so. And even though the Judicial Committee has itself disclaimed either the intention or the power

CHAP. IV. of framing doctrine, yet every one is aware, to use the words of the late Bishop of London on this subject,—

^b Hans. 3 S.
vol. III,
p. 609.

“How^b much of the law of the land has been made by the decisions of the judges. Every decision of a point of doctrine by the Judicial Committee would form, as in other Courts of Final Appeal, a precedent. Such precedents settle or modify the law, and at last become law themselves. And thus a Supreme Court of Justice may, in some sense, not only administer but make laws. . . . Can (it) give any decision upon a question which turns upon a point of doctrine without affecting, to some extent, the doctrine itself, as one which is insisted upon or not by the Church? Take any one case of this kind. Suppose (it) called upon to decide a question whether such or such a doctrine is or is not the doctrine of the Church of England. The judgment may be to this effect: It cannot be denied that the doctrine in question is the doctrine of the Church of England, but we do not think it indispensably necessary that a person should believe that doctrine, in order to the exercise of his ministry in the Church. Who does not see that a succession of such judgments would injure the character of the Church of England as a teacher and maintainer of the truth?”

It is impossible to deny the force and justice of these remarks. For it is plain, by a succession of judgments permitting certain doctrines or forbidding certain doctrines to be taught, that the Court would either practically encourage the teaching of those doctrines, or, on the other hand, practically prevent their being enforced throughout the whole region of the Church's instructions. And these events would necessarily ensue notwithstanding that the Court meanwhile reiterated its declarations that it neither had the power nor entertained the intention of altering doctrine. Thus, while the faith of the Church, according to the Court's declarations, abode untouched, the instructions given to the people would assuredly be affected; and supposing the Court to err, that which was not the Church's doctrine might be taught with impunity, or that which was the Church's doctrine might not be so taught, by her ac-

CHAP. IV. credited teachers to the people committed to her care. The effect of a series of erroneous decisions would clearly be most disastrous, for even though a Churchman might point to the Articles and Liturgy and Creeds, and say, these are the standards of my Church, the decisions of a Court cannot affect them; yet, if teaching according to those standards was legally forbidden, or teaching in contravention of them legally authorized, the practical effects would be such as it is not needful at greater length to describe. And thus, while the duty assigned is simply to interpret, not to construct, the gravest risk is run that under the guise of interpretation the work of construction might be carried on by a very different authority from that to which the latter function properly belongs.

^c Hans. 3 S.
vol. III,
p. 608.

And this risk is all the more alarming in proportion as the authority is less qualified for interpretation. "The Judges"

of our Courts of Law," in the words of the late Bishop of London, "when called upon to decide new cases, decide upon certain fixed principles, perfectly familiar to them, which they have only to apply to the facts of the particular case. These decisions are looked upon as faithful and true expositions of the law, because they proceed from those whose thorough acquaintance with the whole system of English jurisprudence, both in theory and practice, renders them perfectly competent to give them, and so it may be that those who are set to administer the law do in some cases make it. So in cases of doctrine, the judges who are ultimately to decide them may, by degrees, alter or modify the laws which relate to them. But then they are not versed in divinity, as the judges of the temporal Courts are in the common and statute law, and in the rules of equity." Now if this be so, and doubtless those learned persons would be

CHAP. IV. the very first to admit the truth of this assertion, interpretation, which may have at least the effect of construction, cannot, with any satisfaction, be conceded to them. This first cause of complaint against the present system, that there is no sufficient security for doctrine, appears, upon consideration, well-founded. And the words of that experienced and accomplished nobleman, who for seventeen years presided over the deliberations of the Judicial Committee, seem fully justified, when, speaking of its present jurisdiction in matters spiritual, he said, appealing meanwhile to the learned lord on the woolsack for a confirmation of his assertion, that “it^d did take away from the Church, to a certain extent, the security which she had possessed for the soundness of her doctrines.”

Hans. 3 S.
ol. III,
. 629.

III. *Incompetency of the Court.*

THIS insecurity is all the more alarming

when the incompetence of the Court for the functions assigned to it is considered. And this is the second just ground of complaint against the present system. CHAP. IV.

It must at the outset be confessed, that this subject should be approached in the most cautious manner, and treated with a careful touch in no way calculated to give just offence. No man is worthy to be listened to for a moment on this head who should fail to express any other than the very highest respect for the characters and talents and attainments of those exalted persons who constitute the Judicial Committee of Privy Council. It is quite impossible to overrate, perhaps difficult even to estimate duly, their eminent qualifications for deciding cases which fall within their proper functions. For they are the very flower of a profession which, in intellectual attainments and perspicuous judgment, is probably equalled by none other in the world. It would be hard to

CHAR. IV. devise a Court which, in all questions involving maritime, colonial, common, and statute law, would be calculated to perform its duty more admirably than the Judicial Committee. But when spiritual questions are involved the case assumes a different aspect. "In all matters," said the late Bishop of London,^e "requiring judicial acuteness and calmness, impartiality and firmness, for the discovery of the truth of facts, and for the explanation and application of the law, nothing more is to be desired. It is only when questions of doctrine arise, and points of faith are to be determined, that I object to that tribunal as incompetent. It is competent to decide all questions of ecclesiastical law, but not matters purely spiritual, involving questions of divine truth. For this office it is not properly qualified with reference either to the Church's original constitution, or to the personal qualifications of the judges."

^e HANS. 3 S.
VOL. III,
P. 606.

It is, indeed, quite likely that no judicial tribunal would be conducted to the best advantage which was not presided over by a lawyer. There is a peculiar aptitude of mind acquired by study and long practice—a peculiar habit of observation and thought, the result of long and laborious training—which enables a lawyer to detect a flaw in an argument, to see at once the strength and weakness of a case, to grasp it in all its bearings, and to apply to it the rules of law. All this is very hardly to be found in other men. And it is certainly most desirable that those peculiar powers should be employed upon any legal questions incident to Ecclesiastical causes. But those powers do not qualify their possessors to decide points of religious doctrine. There is what may be called the theological as well as the legal mind, and that, too, requires its peculiar training. No small amount of laborious application and special study is here also

CHAP. IV. requisite. It is, indeed, well known that some ornaments of the judicial bench have been extremely well read in theology, and the literature of our country gives most unexceptionable testimony to the fact ; but this is not commonly the case, as those most learned persons of which it is composed would be the very first to admit. They are not by their previous study and habits of thought generally qualified to deal with purely spiritual questions, and they are not consequently qualified, in the cases under view, to deal with a considerable part of the subject-matter of their judgments.

It may, perhaps, be said that every educated member of the Church has a competent knowledge of her doctrines. Now, even were this true, it would not meet the present exigency, as the members of the Court under consideration are not necessarily members of the Church of England. But it is not true. There

are many grave questions^f in theology, and those the most likely to come under the consideration of the Judicial Committee, which scarcely ever engage the attention of the laity, especially of those whose time is otherwise taken up, and whose profession necessarily leads their minds to other subjects. It is easy to conceive a case submitted to the decision of the Court in which the subject-matter would be altogether new to the members, and very hardly to be understood by them in the absence of previous study and thought. The terminology itself might be puzzling, and they might hardly comprehend the exact meaning of such expressions as, to persons versed in theology, would appear the mere alphabet of the science. It must be said that, under such circumstances, the members of the Court would be quite incompetent to decide satisfactorily questions involving perhaps in their consequences the peace and unity of the

CHAP. IV.

^f See Bishop of London's Speech; Hans. 3 S vol. III, p 607.

1AP. IV. Church,^g “when all their previous studies
 Hans. 3 S. had lain in an entirely different direction,
 il. III, p. and when their minds had not been pre-
 38. pared by the habitual consideration of such
 matters to take an exact and comprehen-
 sive view of the case before them in all its
 bearings.”

But not only is there an absence of the necessary training in the legal mind for the solution of theological questions, it may very justly be suspected that a positive lack of necessary information, for the decision of the matters submitted to the Court, would often be found. The field of Christian doctrine and the national faith is a very wide one. To have mastered its details implies no inconsiderable amount of reading, and that in several languages. And here, for one, I must protest against a very prevalent notion, that an opinion of any value can be formed by running to text-books, or turning out a word in an index, and referring to isolated passages

bearing on the matter. In the first place, some of our most renowned text-books mislead most grossly, and the most serious and mischievous blunders^h have in the highest quarters been made within a very few years by placing confidence in them. But even where they are right, and supposing them to be quite right in any particular case, it is very certain that a sudden application to a new subject, and a cursory glance at sources of information previously unstudied, do not ordinarily qualify any one for forming a correct judgment. Previous acquaintance with a subject is no more than necessary for such a purpose.

CHAP. IV.

^h Judgment
Court of Ex-
cheq. July 8,
1850.

And in corroboration of the suspicion that the Final Appeal Court, as at present constituted, does not possess the requisite information for the spiritual functions assigned to it, it must be frankly said that *obiter dicta* have been heard to fall from that tribunal by those who take an interest in attending its proceedings, which plainly

REP. IV. testify that some very strange misapprehensions sometimes find place there in the judicial mind on very simple elements of theological learning. Indeed, a very high ornament of the legal profession, and one charged with the most important functions, has been known to declare, if it fell to his lot to decide some questions of spiritual learning, that, after having heard the elaborate and, at times, somewhat perplexing arguments of counsel on the matter in hand, he should be compelled to resort to the expedient of tossing a coin of the realm into the air and concluding his judgment according to that side of the piece which fell uppermost. If this was said in joke it is a joke which very surely is founded on solid and sober truth. When the noble lord, who so long presided over the deliberations of the Judicial Committee, declared (as before said) that "in some casesⁱ he required the aid of a spiritual body in forming his judgment," he as-

ans. 3 S.
: III,
533.

furedly spoke words of truth and soberness, for doubtless the need of full previous information on the matters subject to adjudication cannot rightly be dispensed with on such grave occasions.

There is another possible condition of circumstances under which the competence of the Court lies open to still graver suspicion. And that is a condition by no means improbable. Indeed, it is said that it has been very lately realized. Suppose a new heresy invented, and that there are no positive documents which could be cited precisely bearing on the point. Then if the Court is only a Court of interpretation, as is constantly asserted and fully admitted, the very elements upon which to found a decision would be absent. Some external information would certainly here be requisite beyond that supplied by the authorized formularies themselves. A more extended insight into theological learning would be quite needful for arriving at

CHAP. IV. just conclusions; and this is an insight which could very hardly be expected, save in those who had made the subject their special study.

From the foregoing considerations, it is no wonder if a very general impression prevails that a more special training of the mind, and a more comprehensive and more exact knowledge of the subject-matter involved, than is now the case, is needed by the members of the Judicial Committee of Privy Council for the satisfactory decision of spiritual questions. And though it is impossible to over-estimate the high qualifications of that Court for the performance of all its other functions, still one ventures to hope that no just offence will be given by expressing grave doubts of its competence to discharge satisfactorily those now under view.

IV. *Dissenters possible Members
of Court.*

THE third ground of complaint is that the members of the Court are not necessarily members of the Church of England. And that this is a just ground of complaint we have the testimony of the noble lord the chief author of the statute which established the Judicial Committee. Some years after that tribunal had been in existence he assured the House of Lords, when speaking on the subject of judgments involving doctrine, that "he^k considered that any member of the Council, not being a member also of the Church of England, ought not to sit in such cases." The justice of this grave opinion, given on such grave authority and on so grave an occasion, will hardly be disputed. In this age great uneasiness is expressed in many quarters at any limitations, however just, at any restrictions, however

CHAP. IV

^k Hans. 3 S.
vol. III,
p. 628.

CHAP. IV. wholesome, being assigned, by proper authority, as boundaries of faith and doctrine. But to have such limitations and restrictions defined in matters of the national faith, by persons who do not even profess to hold that faith, is a strange anomaly. Yet against such an anomaly there is no guarantee whatsoever under our present system. And not only is there no guarantee against this anomaly, but it would be statutably legal. It must, moreover, be said that there is some risk of such a state of things occurring, when a Privy Councillor has thought it consistent with his duty to enrol himself as a member of the "Liberation Society," an institution chiefly remarkable for its bitter animosity and untiring hostility to the Church of England.

Not only is this state of things an anomaly,—that is far too mild a description;—it is a cruel hardship. We do not think highly of the management of conquerors,

even Christian ones, who have forcibly compelled the vanquished to accept their victors' faith. But if they had gone about to sit in judgment on the terms of their victims' own religion, to model and define that by their foreign arbitration, we should perhaps think worse of them still. It is really a barbarous exercise of power, and one to which none but the most slavish disposition would quietly submit, that the definition of the doctrines of any man's religion should be committed to the arbitrament of those who hold a different faith. But that a Christian nation should statutably subject its own faith to such a process is, indeed, passing strange. And every Churchman in this land has just ground of complaint on public as well as personal grounds against such inhuman legislation as this:—


οὐκ ἔστι νόσος

τῆς δ' ἦντιν' ἀπέπτυσσεν μάλλον.

Prom. V. 1105-6.

*V. Present Court an Anomaly in
Jurisprudence.*

CHAP. IV. THE fourth ground of complaint against the present Court of Final Appeal is that the system now established is in direct contradiction to the whole genius of English jurisprudence. That Spiritual questions should be tried by Spiritual Courts, or at least by Courts in which the spiritual element prevailed, was the universal practice in this country, until the legislation of 1833 relegated them, in the last resort, to a purely lay tribunal. That a very absurd anomaly was thus introduced into our judicial system may perhaps be demonstrated by an illustration better than by any other means. Suppose that, under the present state of things, the patron of a living were to enter an action, under the form of *quare impedit*, in a Common Law Court, against a Bishop for refusing to institute a clergyman to that benefice ;



suppose the Bishop were to plead in defence that the Clerk in question held, and had preached, the doctrine, say, of "Patripassianism:" the Judge of the Common Law Court would surcease from proceeding, on the ground that the plea would be good in case "Patripassianism" was contrary to the doctrine of the Church of England. Of that point he would say that the Common Law Court, as being a lay tribunal, was no judge, and he would desire an issue to be tried in the Spiritual Courts to decide the question. Suppose the Spiritual Court to find that the Clerk was a heretic. From such decision an appeal would then lie on the doctrinal question to the Judicial Committee of Privy Council, a purely lay tribunal, a Court of civil judicature, not one spiritual person being statutably a member of it. Thus a cause which had been relegated from a Common Law Court, on this very ground that it was a lay tribunal, to a Spiritual Court,

CHAP. IV. would be carried back, in the final event, to a tribunal lying under the very same incapacity as that which, according to the received principles of English jurisprudence, necessitated the first relegation. But really such flagrant contradictions as these in legal proceedings are not creditable, nor do they appear more tolerable when it is remembered that the system which entails them is of mushroom growth. The alternative seems patent enough; either our traditional and more venerable method of procedure must have been erroneous, or this modern plan must be altogether indefensible.

VI. *Jurisdiction obtained by an Accident.*

THE fifth ground of complaint against the present Court of Final Appeal is that the jurisdiction it exercises over the very highest subject-matter—that of faith and doctrine,—fell to its lot by an accident.

Court of Final Appeal. 113

It is unnecessary to repeat the unanswerable evidence of this fact, as detailed above at pp. 74-81. The testimony, however, of the late Bishop of London, and of Lord Brougham, may fitly be here cited. The former, when speaking of the substitution of the Judicial Committee for the Court of Delegates, said that on that occasion the question of doctrinal appeals was "not¹ alluded to." "The reason of which," he added, "I suppose was this, that appeals to that Court in suits involving questions of doctrine had been so exceedingly rare . . . that the contingency of such an appeal came into no one's mind." Lord Brougham also admitted that jurisdiction in cases of doctrine fell *per incuriam* to the Court. His words, as before quoted, were, "He¹¹ could not help feeling that the Judicial Committee of Privy Council had been framed without the expectation of [such] questions . . . being brought before it. It was

CHAP. IV.

¹ Hans. 3 S.
vol. III,

¹¹ Ibid.
p. 629.

CHAP. IV. created for the consideration of a totally different class of cases, and he had no doubt that, if it had been constituted with a view to such cases . . . some other arrangement would have been made."

It was shown above, pp. 79, 80, how this unhappy catastrophe really occurred in the year 1833. And so from inadvertence on the one hand, and a careless use of terms on the other, in drafting an Act^m of Parliament, one of the highest and most important branches of judicature, involving interests connected not only with this world, but the next, fell, by a hap-hazard chance, to a Court no way qualified for the duties assigned, and to which those interests never would have been committed with deliberate purpose and on sufficient consideration. This surely supplies good ground for complaint, and amply justifies the loudest appeals for a remedy.

^m 3 & 4 Will.
IV. 41.

It is further to be noted that the ecclesiastical authority of this Court cannot

plead a word on the score of antiquity in its favour. The unfortunate mischance which conferred this jurisdiction in matters spiritual is of very recent date, so that no ancient usage or custom can throw any mantle of defence round it. Venerable antiquity might confer on it some constitutional claim for respect, even though its origin was remotely traceable to an error. But it cannot boast even of the recommendation of ancient custom to reconcile us to its existence. It is of mushroom existence, a creation comparatively of yesterday. It sprung up indeed at first unobserved and in retired obscurity, but from its sudden expansion, its strange growth, and its dangerous qualities, it soon attracted unenviable notoriety, and has become the subject of just suspicion, alarm, and complaint.

VII. *Spiritual Questions referred to a
Lay Tribunal.*

THE sixth and last ground of complaint

CHAP. IV. now to be mentioned against the Court of Final Appeal is, that, under the present law, spiritual questions are referred to lay judges. Now to some minds this appears to be the greatest offence of all in the present system, indeed, so great as to cast all others into the shade. Yet, of course, I am aware that to other minds this may appear to be no offence at all. That is to say, that the mere fact of the Court's being a lay tribunal, irrespective of any other disqualification, may appear to them to afford no just ground whatever for dissatisfaction. However, as I suggest this as a distinct ground of complaint, it behoves me at least to endeavour to show it to be a just one.

(a.) Now, in the first place, to refer spiritual questions to the arbitration of lay judges is against the original constitution of the Church of Christ.

"There is," said the late Bishop of London, when addressing the House of

Lords on this subject,ⁿ “an inherent and indefeasible right of the Church to teach and maintain the truth by means of her spiritual pastors and rulers, a right inherent in her original constitution and expressly granted to her by her Divine Head in the terms of the apostolical commission.” “Go^o ye, therefore, and teach all nations,” were the Lord’s words on the Galilæan mount. That was a duty committed alone to His apostles and those who should succeed them, and, so far as can be shown by just example, may not be publicly usurped by any others.

This fundamental principle of the Christian Church,—that those who were ordained to her ministry, and those only, should be the arbiters of her doctrine—then established by her Lord as an original part of her constitution, formed the footstone of her authoritative proceedings, in resolving those doubts which early arose within her borders. And that

CHAP. IV.

ⁿ Hans. 3 S.
vol. III,
p. 619.

^o S. Matt.
xxviii. 19.

- CHAP. IV. has remained a fixed principle ever since save in instances of unjust usurpation. Within about seventeen years of our Saviour's crucifixion a discussion arose as to whether the Gentile converts should be taught the necessity of circumcision on their admission into the Christian Church. To determine this question it was agreed that
- ^p Acts xv. 2. S. Paul and S. Barnabas^p should go up to Jerusalem; and on their arrival "the^q
- ^q Ibid. 6. apostles and elders came together to consider of this matter." The decisions arrived at were forwarded to Antioch in the name of the apostles and elders, and of the whole Church. And though the whole Church at Jerusalem then consented to the judgment, yet it is observable that
- ^r Ibid. 2. it was to the apostles and elders,^r and to them only, that S. Paul and S. Barnabas were sent about the matter under discussion. They were the apostles and elders, and they only, who came together to
- ^s Ibid. 6. "consider^s of this matter." And further,

the judgment then given is afterwards mentioned in Holy Writ as having been determined by the apostles and elders and by them only. For when S. Paul proceeded on his second journey, in company with Silas, as they passed through the cities "they" delivered them the decrees for to keep that were ordained of the apostles and elders which were at Jerusalem."

CHAP. IV.

^t Acts xvi.
6.

Now this element of the original constitution of the Christian Church, as established by her Lord Himself, and thus illustrated by apostolic practice, prevailed throughout all the first ages of her existence. All her early history, all accounts of her first Councils testify to this fact, that the arbitration of spiritual questions was confined to spiritual judges. And when on occasion laymen conjoined their authority to that of her ordained ministers, by signing their names to recorded judgments, the signatures^u of the clergy ran—*ego definiens subscripsi*,—those of the laity

^u Field, O
the Church
p. 646, ed.
1635.

CHAP. IV. in quite a different form,—*ego consentiens subscripsi*.

And so to refer the law divine to the arbitration of laymen is against the original constitution of Christ's Church.

(*b.*) In the second place, to refer spiritual questions to the arbitration of lay judges is against the practice which prevailed in Christian states in the early ages of the Church.

That great change in the world's history, the adoption of Christianity by the civil power, was allowed to work no change in this respect on the original constitution of the Church. We continually find the personal testimony of the highest authorities in those times accorded to this principle, that spiritual questions should be restricted to the arbitration of spiritual judges. The Emperor Constantine, at the Council of Nice, testifying his joy at being surrounded by so august an assembly, declared that "he^x himself desired

^x Conc. Nic.
July 3, 325.

to appear in the Council simply as one of the faithful, and that he freely left to the Bishops the sole authority to settle questions of faith." Valentinian the Elder, when the condemnation of Arianism was proposed, said that "he" himself being one of the laity might not meddle in such matters, and thereupon willed that the clergy, to whom the care of such things belongeth, should meet and consult together by themselves where they thought good." Theodosius the Great declared that it was unlawful for a layman, however exalted, "to² interpose in religious affairs." To the same purpose are the words of the Emperor Basilus, "Laymen^a must by no means meddle with causes ecclesiastical, nor oppose themselves to the unity of the Church or Councils Œcumenical." In fine, the practice of the early Christian emperors is fully expressed in those pregnant words of Caesaron, "The^b pious emperors sanctioned

CHAP. IV.

¹ Soz. lib. vi.
c. 7; Eccl.
Pol. 3. 337.

² Coll. Eccl.
Hist. vi. 247.

^a Jer. Taylor, Works,
vii. 210.

^b De Lib.
Ecc. ii. 5.

CHAP. IV. the reception of those things by all the people which the Fathers of the Church had decreed."

And so to refer spiritual questions to the arbitration of lay judges is against the practice which prevailed in Christian states in the early ages of the Church.

(c.) In the third place, to refer spiritual questions to the arbitration of lay judges is contrary to the principles laid down by an unbroken succession of the most trustworthy authorities.

De Marca, speaking of the proceedings of the Emperor Theodosius, with respect to ecclesiastical jurisdiction, says:—

^c De Concord. Sacerd. et Imperii. tom. iii. fol. 200, Bamb. 1788.

"Eximiâ^c profectò auctoritate potiti sunt Imperatores Romani in rebus et judiciis ecclesiasticis. Sed nullum, ut existimo, proferri potest exemplum judicii canonici ab uno Episcopo redditi, de quo statim rectâ viâ querela delata est ad principem. Illi judices ecclesiasticos dabant, nunquam autem de re canonicâ cognitionem suscipiebant, sed de ordine judiciorum."

^d De Promulg. Leg. Ecc. tom. iv. fol. 164, Lovan. 1753.

Van Espen writes in the same sense:—

"Indubitatum,^d est examen ac decisionem fidei, Ecclesiæ ejusque ministris, non autem principibus

laicis, a Deo concreditam. . . . Nec id unquam Principes Catholici sibi attribuerunt, sed ipsos Pontifices et Episcopos et Ecclesiæ pastores, judices doctrinæ nunquam non agnovêre.”

CHAP. IV.

Again, that same writer thus distinguishes between the civil and ecclesiastical functions touching matters spiritual:—

“Aliud* enim longe est principem se interponere promulgationi novæ legis per suas provincias ejusque executioni, et aliud velle judicare de ipsis articulis et dogmatibus, sive quid de fide credendum, vel non credendum definire.”

* De Promulg. Leg. Ecc. tom. iv. fol. 164, Lovan. 1753.

The distinction thus expressed by the greatest of modern canonists regulated the exercise of the imperial or royal supremacy in the “*Appellationes tanquam ab abusu*,”—the “*Appel comme d’abus*,”—a subject which has received great attention from the French lawyers and divines. It has been largely treated^f of by M. Lainé, as quoted by M. Dupin, in his “*Manuel du droit Ecclésiastique*.” And the interference of the civil power is by them represented as being specially limited to three cases. 1. When ecclesiastical autho-

^f See Bishop of London’s Speech; Hans. 3 S. vol. 111, p. 612.

CHAP. IV. the reception of those things by all the people which the Fathers of the Church had decreed.”

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^f See Bishop of London’s Speech; Hans. 3 S. vol. 111, p. 612.

CHAP. IV. rities had exercised an excess of spiritual power; 2. When they had violated the laws of the kingdom and the rights of citizens; 3. When they had committed outrage or violence in the exercise of ecclesiastical functions. But under that form of appeal no right of interference was ever claimed by the civil power in the determination of purely spiritual questions. The doctors of the Sorbonne strenuously asserted the liberties of National Churches in this respect, upon the principle that, as in questions of faith they could decide independently of the Pope, *à fortiori*, they could decide independently of the Prince. Pope Clement VII. was addressed by one of their most celebrated writers, Petrus Alliacensis, in the name of the whole faculty, on the subject, and he asserted that to exclude Bishops from the examination and decision of spiritual questions was "*contra jus tum divinum quum huma-*

num.” In maintaining this principle of independence in matters spiritual the celebrated Bossuet afterwards bore a conspicuous part in his defence of the liberties of the Gallican Church. And in the ecclesiastical law of France that principle is still acknowledged, for though the “*Appel comme d’abus*” yet exists, it is admitted only where the rights of subjects are involved, not in questions of faith and doctrine.

But to come to the authorities of our own country, we have the testimony of our most renowned Jurists very plainly recorded on this subject,—Sir Edward Coke, Lord Bacon, Sir William Blackstone, may all be quoted. Sir Edward Coke’s words are :—

“ Certain it is that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is when the justices of the temporal Courts and the Ecclesiastical judges, have kept themselves within their proper jurisdictions, without encroaching or usurping one upon another, and when

126 *Complaints against the*

CHAP. IV. such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience."

Sir Edward Coke also said, in the case of *quare impedit*,—

"If the cause of refusal to institute be spiritual, the Court shall write to the Metropolitan to certify thereof."

Lord Bacon, speaking of questions touching the law divine, says that they should be—

¹ Works, vol. ii. p. 512, 513.

"Left¹ to the holy wisdom and spiritual discretion of the master builders and inferior builders in Christ's Church."

Sir William Blackstone says:—

^k Comm. vol. i. p. 389.

"If^k the cause be of a spiritual nature (as heresy particularly alleged) the fact if denied shall be determined by a jury, and if the fact be admitted or found, the Court, upon consultation and advice of learned divines, shall decide its sufficiency."

In *Specot's* case the Court of King's Bench ruled that—

"It doth not appertain to the King's Court to determine schisms and heresies; and where the ori-

ginal cause of the suit is matter whereof the King's Court hath cognizance, the King's Court is to consult with divines to know whether it be schism or not." CHAP. IV.

And the evidence of all this high legal authority may finally be summed up in the words of Bracton, contained in one of the most ancient, as well as the most methodical and accurate, treatises on English law ever written. In speaking of the distinction between civil and ecclesiastical jurisdiction he says:—

“Cum¹ diversæ sint hinc inde jurisdictiones, et diversi judices, et diversæ causæ, debet quilibet ipsorum imprimis æstimare an sua sit jurisdictio, ne falcem videatur ponere in messum alienam.”

¹ Lib.v. c. 2,
p. 401. Ed.
Lond. 1569.

And again, in the same sense, he writes:—

“Non¹¹ pertinet ad regem injungere poenitentias, nec ad judicem secularem, nec etiam ad eos pertinet cognoscere de iis, quæ sunt spiritualibus annexæ.”

¹¹ Ibid.

Such testimony we have on this point upon the foregoing authority of the most learned Canonists and Jurists.

CHAP. IV.

Of course the testimony of divines might be quoted to an indefinite length on this head, but perhaps some persons might be disposed to give less weight to their opinions from a lurking suspicion that they were over-favorable to the authority of their own order. However, the evidence of some shall be produced.

^m Atterbury: Rights, pp. 15, 16.

ⁿ Of the Church, bk. v. p. 646.

A public episcopal document of King Henry VIII.'s time contains the following words: "In^m matters of faith and interpretation of Scripture no man made definitive subscription but Bishops and Priests, forasmuch as the declaration of the word of God pertaineth unto them." The great schoolman, Field, when speaking on the subject of spiritual decisions, says: "Weⁿ all teach that laymen have no voice decisive, which may be confirmed by many reasons." On three of those reasons that learned author dilates; the first being drawn from the nature of the relationship between a pastor and a flock; the

second from the apostolic dissertation on the gifts which He who "ascended^o up on high gave unto men;" the third is based on historical precedent. Hooker says, "Of^p this most certain we are, that our laws do neither suffer a Spiritual Court to entertain those causes which by the law are civil, nor yet if the matters be indeed spiritual, a mere Civil Court to give judgment of it." Jeremy Taylor designates the introduction of lay judges into matters spiritual as "an^q old heretical trick." And speaks of it as "a^r pretty pageant, only that it is against the Catholic practice of the Church, against the exigence of Scripture, which bids us require the law at the mouth of our spiritual rulers." The learned Barrow, who never committed himself to any assertion which would not stand the test of strictest scrutiny, asserts that "the^s power of managing ecclesiastical matters did, according to primitive usage, wholly reside in spiritual guides." And, finally, the

CHAP. IV.

^o Eph. iv. 8.

^p Ecc. Pol.
3. 359, 360.

^q Works,
vol. 7. p. 208.
^r Ibid. 209.

^s Serm. 57.
vol. iii. p.
311.

CHAP. IV. united judgment of those learned persons who, at the period of the Reformation, compiled the digest of ecclesiastical law, then intended for the regulation of the English Church, and known as the "*Reformatio legum Ecclesiasticarum*," lent the whole weight of their authority to the principle now contended for. On the subject of an appeal carried, in a spiritual cause, to the Crown, their language is as follows:—

¹ Ref. Leg.
de App. c. 11,
p. 283.

"Quo^t cum fuerit causa devoluta, eam vel concilio provinciali definire volumus si gravis fit causa, vel a tribus quatuorve Episcopis."

And so to refer spiritual questions to the arbitration of lay judges is contrary to the principles laid down by an unbroken succession of the most trustworthy authorities.

(*d.*) In the fourth place, to refer spiritual questions to the arbitration of lay judges is a breach of the compact between the Church and the State of England.

That compact can be found wholly

represented in no one instrument. It can be traced to no one specific date. It is made up of various elements, and must be sought in decisions of great Councils, in Canons of Synods (which need not be particularly specified), in acknowledged obligations of the Crown, in Acts of Parliament, in declarations of Princes, in the Common Law, and in immemorial usage. To such various sources for information on this subject we must have recourse.

CHAP. IV.

Now in Saxon times we find this compact very early existing. The first clause in the Acts of the Mixed Council of Brafted, A.D. 696, enacted by King Withred, with the assent of his Princes and the whole assembly, runs thus—“*Let^u the Church be free and maintain her own judgments.*” That is the footstone on which the union of Church and State was then laid. In the later ages of the Saxon period it is well known that the Bishop and the Sheriff,

^u Spel. Conc
I. 194.

CHAP. IV. or Alderman, presided in the County Court, the one for the decision of spiritual, the other for that of civil causes. And this principle, that spiritual questions should be confined within the province of the spiritual judge, is plainly laid down in the laws of King Edgar :—

* Leg. Ed. “Celeberrimo* huic conventui Episcopus et Aldermannus interfunto, quorum alter jura divina, alter humana, populum edoceto.”

The words of that same monarch to Archbishop Dunstan and his suffragans (A.D. 969) are to the same purport, enforcing the distinction between civil and spiritual authority. “I,” said he, “wield the sword of Constantine, you that of Peter.”

† Conc.
Mag. B. I.
246.

And when the changes introduced by the Norman institutions effected a distinct separation between the Ecclesiastical and Civil Courts, it was expressly forbidden that spiritual causes should be submitted to lay judges. This was definitely laid

down by the Charter of King William I, CHAP. IV.
A.D. 1085, in the following words :—

“ Nec * causam, quæ ad regimen animarum pertineat, ad iudicium secularium hominum adducant. Sed quicumque secundum Episcopales leges de quâcunque causâ vel culpâ interpellatus fuit, ad locum, quem ad hoc Episcopus elegerit et nominaverit, veniat, ibique de causâ vel culpâ suâ respondeat. . . . Hoc etiam defendo et meâ autoritate interdico, ne ullus vicecomes aut prepositus seu minister regis, nec aliquis laicus homo de legibus, quæ ad Episcopum pertinent, se intromittat.”

* Charta
Reg. Will. I;
MS. Lynd.
ad init.
my copy.

The Eighth Constitution* of Clarendon expressly laid down that every spiritual question should here be terminated in the Court of the Archbishop, thus restricting to spiritual arbitration, within this land, all causes involving doctrinal contention.

* Spel. Conc.
vol. ii. p. 63.

Then comes the keystone of English liberty, the charter of our national freedom. And what are the very first words of that time-honoured document? Magna Charta thus begins :—

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CHAP. IV. “*Libera sit Ecclesia habeatque sua jura libertateſque illæſas.*”

It ſhould be remembered that this charter of the rights and liberties of the Church received freſh national confirmation in the reigns of King Henry III, King Edward I, King Edward III, King Richard II, King Henry IV, and that in ſome inſtances ſeveral times repeated. And the very firſt of thoſe rights and privileges is to arbitrate on her own doctrines.

The thirteenth chapter of the ſtatute “*Articuli Cleri*,” deſcribed by Lord Coke, not merely as enacting, but as declaratory of, the common law and cuſtom of the realm, runs thus:—

Cited in
ſans. 3 S.
ol. III,
. 610.

“*Alſo^b it is deſired that ſpiritual perſons, whom our Lord the King doth preſent unto benefices in the Church, if the Biſhop will not admit them, (either for lack of learning or for other reaſonable cauſe,) may not be under the examination of lay perſons, but that they may ſue to an Eccleſiaſtical Judge, to whom it of right belongs, for the obtaining of ſuch a remedy as may be juſt.*”

The answer is,—

CHAP. IV.

“Of the fitness of a person presented to a benefice the examination belongs to the Ecclesiastical Judge. So it hath been heretofore used, and shall be so in future.”

Even in the reign of Henry VIII, that most rapacious grasper of rights and privileges no way appertaining to him, when by statute (26 Henry VIII. c. 1.) “*the King’s Grace was authorized to be Supreme Head*,” this capacious title was by no means interpreted to confer authority on the Crown to give final judgment by lay authority on matters of faith. It is explained to a much more inoffensive sense in a State Paper lately discovered by Mr. Froude^c in the Rolls House MSS, the words of which are as follow. The King does not—

^c Hist. Eng.
vol.iii.p.326.

“Pretend thereby to take away any power from the successors of the Apostles that was given to them by God” Nor did “the King’s Grace, his nobles, or subjects intend to decline or vary

CHAP. IV. from the Congregation of Christ's Church in anything concerning the Articles of the National Faith."

Indeed, whatever may have been falsely said to the contrary, it is quite plain that throughout this reign questions of the law divine were generally thought to be constitutionally restrained to the spirituality. For though Acts of Parliament frequently dealt with spiritual matters; yet it is evident to those who take the trouble to investigate dates, that such matters were previously settled in the Provincial Synods, and subsequently ratified by the civil legislature. And indeed this course was followed not only in matters of pure spiritual cognizance, but often in such as only touched on ecclesiastical jurisdiction. The nullification of Queen Catherine of Arragon's marriage was wholly the act^d of the Convocations. The divorce of Queen Anne Boleyn was sanctioned^e by the same authority. The nullification of Queen

¹ Conc.
Mag. B. 3.
756-767.
759.
¹ Ibid. 803,
304.

Anne of Cleves' marriage was entirely decided by the same tribunal, and its history affords a most imposing instance^f of the judicial functions then exercised by the spirituality. To have submitted a question of faith and doctrine to lay judges would certainly then have excited a measure of surprise strangely contrasting with the indifference with which such a course is at this day witnessed.

CHAP. IV.

^f Conc.
Mag. B. 3.
851-854.

Nor were matters in this respect changed in the next generation.

It is notorious that the Supremacy Act^g above referred to, having been repealed in the reign of Queen Mary, was, among others in like condition, revived in the first year of Queen Elizabeth, but in a more inoffensive form, the term "Supreme Governor"^h being then substituted for that of "Supreme Head." And even lest that less surprising title should seem to challenge defining authority for the Crown in matters purely spiritual, her

^g 26 Hen.
VIII. c. 1.

^h 1 Eliz.
c. 1.

CHAP. IV. Majesty thought fit, by her injunctions, to disclaim such an interpretation in the words following :—

¹ Qu. Eliz.
Injunct.
A.D. 1559.
Spar. Coll.
p. 83.

“ Certainly¹ her Majesty neither doth nor ever will challenge any authority than that was challenged and lately used by the noble Kings of famous memory, King Henry VIII. and King Edward VI, which is and was of ancient time due to the Imperial Crown of this realm, that is, under God, to have the sovereignty and rule over all manner of persons born within these her realms, dominions, and countries, of what estate, either ecclesiastical or temporal, soever they be, so as no other sovereign power shall, or ought to have, any superiority over them.”

Here, again, we find the civil power restrained to sovereignty over persons, *i. e.* excluding Roman assumption, and to that measure of authority of ancient time due to the Imperial Crown of this realm. And such measure of authority most unquestionably never extended anciently to arbitration in questions of faith.

Again, the royal declaration prefixed to the Articles of Religion in King Charles the First's reign, and pledging subsequent

Sovereigns by its presence, clearly restrains spiritual questions to spiritual arbitrament:—

CHAP. IV.

“ If^k any difference arises about the external policy concerning the injunctions, canons, and other constitutions whatsoever thereto (*i. e.* the Church) belonging, the Clergy, in their Convocation, is to order and settle them.”

^k Pref. to
39 Articles.

The Bill of Rights, another defence against usurpations, set forth a virtual repetition of those memorable enactments of the Council of Brafted and of Magna Charta,—“ Let the Church be free,”—when it reprobated the relegation of spiritual causes to a civil tribunal in these words:—

“ The^l Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other Commissions and *Courts of a like nature*, are illegal and pernicious.”

^l Echard,
Hist. Rev.
p. 264;
¹ Will. &
Mary, c. 2.
s. 36.

Eight out of the then twelve Judges, with the Attorney and Solicitor General, in Queen Anne's time, added the weight of their authority to enforce the principle that spiritual questions should be decided

CHAP. IV. by spiritual judges when they gave this opinion on a case submitted to them by the Crown :—

^m Card.Syn.
2. 762. “ We^m humbly lay before your Majesty that all our law books that speak of this subject, mention(ing) a jurisdiction in matter of heresy and condemnation of heretics, as proper to be exercised in Convocation . . . and none of them that we find making any doubt thereof.”

The Common Law of England, in the matter of prohibitions, is true, and always has been, to the principle here contended for. It is distinctly laid down that—

ⁿ 2 Roll.
Rep. 439;
1 Bulst. 159. “ Ifⁿ the Ecclesiastical or Spiritual Courts proceed wholly on their own Canons they shall not be prohibited by the Common Law, for they shall be presumed to be the best judges of their own laws.”

And again,—

^o March.92. “ When^o the Ecclesiastical Court hath the sole cognizance of a cause their proceedings are not examinable at Common Law, though erroneous, and no prohibition will lie.”

And again,—

^p 2 Lill.
386. “ If^p a matter is properly determinable in the

Spiritual Courts, and they make an erroneous decree, the King's Bench will not grant a prohibition." CHAP. IV.

Thus this venerable compact, that—
“*the Church should be free and maintain her own judgments,*”—has been ratified over and over again, and confirmed in all ages of our history, by acts of Councils, by Canons of Synods, by acknowledged obligations of the Crown, by Acts of Parliament, by declarations of Princes, by Common Law, and by immemorial usage. The principle now maintained is so distinctly embodied in the preamble of the statute (24 Hen. VIII. 12) that it shall be here transcribed. And as that document is the exact expression of the present compact between the Reformed Church of England and the State of England; its contents deserve the most careful consideration, and should be the foundation of all legislation which affects their joint interests.

Speaking of “this realm of England,” it says:—

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CHAP. IV. “The¹ body spiritual, whereof having power,
 1 24 Hen. when any cause of the law divine happened to come
 VIII. 12. in question or of spiritual learning, then it was de-
 Preamble. clared, interpreted, and showed by that part of the
 said body politic called the spirituality, now being
 usually called the English Church, which always hath
 been reputed, and also found of that sort, that both
 for knowledge, integrity, and sufficiency of number,
 it hath been always thought, and is also at this hour,
 sufficient and meet of itself, without the intermeddling
 of any exterior person or persons to declare and de-
 termine all such doubts, and to administer all such
 offices and duties as to their rooms spiritual doth
 appertain.”

And lastly, this ancient compact between
 the Church and the State, so heedlessly
 broken in the year 1833, was from time to
 time solemnly ratified by the oath of every
 sovereign, under our present constitution,
 who ascended the throne of this realm.

1 Cor. Oath. “Will you,”¹ inquired the Archbishop,
 Blacks. on those august occasions, “preserve unto
 Com. I. 235. the Bishops and Clergy of this realm . . .
 all such rights and privileges, as by law do,
 or shall, appertain unto them, or any of

them?" "All this I promise to do," was the answer. And then, touching the holy Gospels, the Sovereign added, "The things which I have here before promised I will perform and keep, so help me God," and then kissed the book. CHAP. IV.

And so to refer spiritual questions to the arbitration of lay judges is a breach of the compact between the Church and the State of England.

VIII. *Commission of the Galilean Mount.*

AND why is it that this compact between the Church and State—that the Church should be "*free in her judgments*"—has been so emphatically declared, so frequently repeated, and so stringently ratified? Surely, because it has ever been held, and rightly held, by both, that an authoritative judgment on faith and doctrine is the very highest expression of the "teaching of the Word," for the intended effect and end

CHAP. IV. of such a judgment is to govern and direct the ministration of the Word throughout the whole region of the national Church. Such judgment is, in truth, a teaching of far wider extent and of far larger effect and influence than the teaching of any individual preacher or any number of individual preachers, because it is directed to prevail throughout the entire range of the Church's instructions, whenever and wherever given. And this function of teaching the Word has never, till lately, been held to belong to the civil power.

• Bp. London, Speech, Hans. 3 S. vol. 111, p. 619.

The compact between the Church and State was originated, ratified, and continued upon the fundamental principle before quoted that it is "*the*" *inherent and indefeasible right of the Church to teach and maintain the truth by means of her spiritual pastors and rulers, a right inherent in her original constitution, and expressly granted to her by her divine Head*

in the terms of the Apostolical Com- CHAP. IV.
mission."

The words which the Lord, multiplying earthly supplies for the fainting multitudes in the wilderness, addressed to His ministering servants,—“Give ye them to eat,”—are but typical of that duty of feeding His people with the bread of life, which He finally enjoined on the mountain in Galilee, when He bade His Apostles “Go, . . . and teach all nations.” And this duty has been entailed, with the promise of Christ’s presence annexed,^u on those who, in unbroken succession from those Apostles, have been invested in the Church with the office of dispensing His divine word to her sons, in her and through her, the food of their spiritual life.

^t S. Matt.
xxviii. 19.

^u Ibid. 20

Of course it is, unhappily, too certain that by many persons such claims of authority, through apostolical succession, will be received with a sneer; but I must take leave to say that for the present

CHAP. IV. purpose I am no way bound to establish them by any argument, nor to show that, in the words of Archbishop Bramhall, "Apostolical^{*} succession is the nerve and sinew of Apostolical unity," nor that, in the words of Bishop Beveridge, "Apostolical^{*} succession" is "the root of all Christian communion." I am no way called upon for the present purpose, either to prove on the one hand the historical fact of a direct Apostolical succession in our Church, nor on the other the necessity of it, whether to the perfection or to the existence of a Church. Those subjects might well demand proof on proper occasions, but the present argument by no means requires it. For the State has fully, formally, and emphatically adopted the belief of the fact and all the consequences thence ensuing.

The belief in the direct transmission of spiritual authority to teach the Word is the very groundwork of our second

Works,
vol.i. p.112.

^{*}Serm.vol.i.
p. 23.

Ordination Service, unless indeed its terms contain a trap set to ensnare the consciences of our bishops, and practise a shameless deception on every man who receives priest's orders at their hands. And that ordinal has not only been accepted by the State, but has had the seal of statute law set to it. So it is no way needful for the present purpose, in a question as between the Church and the State, to adduce proof for that which an Act^y of Parliament joins in solemnly enforcing.

CHAP. IV.

^y 13 & 14
Car. II. c. 4

VIII. *Recapitulation.*

THE foregoing, then, are the grounds of complaint against the present Court of Final Ecclesiastical Appeal. 1. That there is no security for doctrine; 2. that the Court is incompetent; 3. that dissenters are possible members; 4. that the present system is an anomaly in respect of legislation; 5. that the jurisdiction was vested in the Judicial Committee by an over-

CHAP. IV. fight ; 6. that spiritual questions are submitted to a lay tribunal ; and that this last course is against the original constitution of the Church of Christ, against the practice which prevailed in Christian states in the early ages of the Church, against the whole stream of trustworthy authority, and is a breach of the compact between Church and State. For that venerable and solemn contract is sadly rent by the present application of the provisions of the Privy Council Act,² raising against the Church of England a threatening front of hostile defiance.

² 3 & 4 Will.
IV. 41.

² Virg. *Æn.*
x. 90, 91.

“ . . . Quæ^a causa fuit confurgere in arma,
 et fœdera solvere furto ? ”



CHAPTER V.

SUGGESTIONS FOR A REMEDY OF THE GRIEVANCE.

I. *Introduction.*



It is comparatively easy to find fault with most human systems, but to utter complaints without suggesting any means of remedy is worse than a useless employment. An inquiry will therefore now be made, whether some cure for the disorders above specified might be satisfactorily provided. This subject, however, as involving matters of great delicacy and difficulty, is to be approached with considerable diffidence, with due respect for

CHAP. V.

CHAP. V. the opinions of others, and with all proper consideration for the acknowledged rights of the State as well as of the Church.

It is thought by many that the Church's absolute freedom of judgment in doctrinal questions cannot be reconciled in the constitution of a Final Appeal Court with the Royal Prerogative and Supremacy. The Crown, inheriting such attributes, and as the representative of the State wielding the sword, will never consent, it is said, to part with judgment in the last resort in any cause whatsoever. Now let this be fully conceded, that the Crown, being supreme in all causes and over all persons, should give final judgment. But the precise question before us is, how should that judgment be arrived at? The fact being admitted that the Crown is supreme in external co-active jurisdiction, how should the Crown, without infringing the liberties of the Church, come to a right and just determination, before pronouncing,

through the constituted Courts, a final decision? This is the real question to be solved. And, as it seems to me, it may be solved, and solved satisfactorily, with due regard to all the privileges, authorities, rights, and interests involved. Before, however, proceeding to suggest any means for attaining so desirable an end, it is needful to clear the way with some remarks.

II. *Royal Supremacy.*

Now there are sundry loose and undistinguishing notions floating about in some minds on the subject of the Royal Supremacy, which are no way warrantable. An over-capaciousness of grasp is frequently assigned. It cannot be reasonably imagined that by this attribute the monarch is personally and individually empowered to give judgment in any ecclesiastical cause whatsoever, whether in inferior, superior, or final Courts. “That^a Kings

^a Hooker,
vol. iii.
p. 348.

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CHAP. V. may personally sit in the Consistory where the Bishops do, hearing and determining what causes soever do appertain unto the Church ; that Kings and Queens, in their own proper persons, are *by judicial sentence to decide the questions which do arise about matters of faith and Christian religion . . .* finally that Kings may do whatsoever is incident unto the office of an Ecclesiastical Judge . . . we account absurd."

The Bishop of Oxford truly stated this matter to the House of Lords, when he said :—

Hans. 3 S.
l. III,
666.

" No^b man valued the Queen's Supremacy more than he, but he did not believe that it was a correct or constitutional interpretation of that Supremacy to say that the occupant of the throne should settle, in his or her own individual capacity, articles of faith, or any other questions whatsoever. He was sure that the exalted personage who at present occupied the throne would be herself the first to repudiate so unconstitutional a doctrine. The Supremacy of the Crown meant nothing more or less than this, that the Crown had the ultimate appeal on all questions

Ecclesiastical and Civil, deciding such questions not as of herself, but through her proper constitutional agents. How could it be said to interfere with the Supremacy of the Crown to give additional means of information to the Judges appointed under the Crown? How could it be said to encroach on the royal prerogative to enact that for the future the law lords, when called upon to decide in matters of faith and spirituality, should do so with the assistance and co-operation of the dignitaries of the Church?"

Royal Supremacy is not exercised by judgment personally given in the Courts, but only by insisting on justice being done in all and each, by authority properly constituted on the principles of the constitutional compact. For, when the Coronation Oath has been taken, "all^c constitutional transactions between the Crown and subject are both essentially and formally legal covenants, King and people alike obeying the supremacy of the law," and the oath "is deposited in the Chancery to be produced against the Sovereign should the compact be infringed." In the Civil State

^c Palgrave, History of Normandy and England, p. 87.

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CHAP. V.

^d Hooker,
Eccl. Pol.
vol. iii.
p. 308.

the axioms of our regal government are thus well expressed,—“*Lex^d facit regem*”—“*Rex nihil potest nisi quod jure potest*”—“*The King's grant of any favour made contrary to the law is void.*” And such principles are eloquently commended in those pregnant words of Hooker, “Happier^e that people whose law is their king in the greatest things, than whose King is himself their law. When the King doth guide the State, and the law the King, that commonwealth is like an harp or melodious instrument, the strings of which are tuned and handled all by one, following as laws the rules and canons of musical science.”

^e Ibid.

And as in the Civil so in the Ecclesiastical State this harmony should ever be maintained. The principles which govern the relations between the Crown and each of those states being analogous, so far as regards judicial sentences, the special subject before us. “For^f the received laws and liberties of the Church,” says the

^f Ibid. viii.
2. 17.

above-quoted judicious writer, "the King hath supreme authority, against them none," in accordance with those words of S. Ambrose, "*Imperator bonus intra Ecclesiam non supra Ecclesiam est.*" And within what bounds, as regards decisions on faith and doctrine, the Royal Supremacy is confined, we are assured by the statutable words of the constitutional compact, which asserts of this realm of England, in words before quoted, "The^h body spiritual, whereof, having power, when any cause of the law divine happened to come in question, then it was declared, interpreted, and showed by that part of the said body politic called the spirituality, now being usually called the English Church."

But not only are these limits assigned to the exercise of Royal Supremacy in respect of declaring doctrine, others also exist. For instance, the Crown never has been, and never can be supposed by any one of competent information to be

CHAP. V.

g Hooker,
Eccl. Pol.
vol. iii.
p. 300.

h 24 Hen.
VIII. 12.
Preamble.

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CHAP. V. charged with those functions which all worthy precedent has combined to assign exclusively to the ecclesiastical order.

¹ Bp. Andrews, *Tortura Torti*, p. 380.

“ Neque¹ vero id agit rex, ne patitur quidem ut sibi potestas sit vel incensum adolendi cum Oziâ, vel arcam attrectandi cum Ozâ. . . . *Docendi munus vel dubia legis explicandi* non assumit, non vel conaciones habendi, vel rei sacræ præeundæ, vel sacramenta celebrandi; non vel personas sacrandi, vel res; non vel clavium jus, vel censuræ. Verbo dicam, nihil ille sibi, nihil nos illi fas putamus attingere, quæ ad sacerdotale munus spectant, seu potestatem ordinis consequuntur. Procul hæc habet Rex, procul à se abdicat.”

Again, to the same purpose, Bishop Bilson writes:—

² Christian Subjection, p. 297.

¹ Ibid. p. 327.

^m Ibid. p. 332.

“ That^k princes may prescribe what faith they list, what service of God they please, what form of administering sacraments they think best, is no part of our doctrine. . . . We^l give princes no power to devise or invent new religions, to alter or change sacraments, to decide or debate doubts of faith, to disturb or infringe the Canons of the Church. . . . We^m never said that princes had any spiritual power, and the sword which they beare we never called but

externall and temporall; for the true spirituall and eternal sword is the Word of God." CHAP. V.

And though the fatal consequences of any usurped excess of authority on the part of the Crown may not always appear in the Church so visible as they do in the State, "because" many of them are of a spiritual nature, and such as will only be known to their full extent when we come into the next world, yet as the Church is a society no less orderly and regular in its constitution than any temporal kingdom whatever, so this usurpation is equally inconsistent with the well-government and design of this spiritual, as it is with that of any civil society."

" Potter,
Ch. Gov.
p. 218.

Indeed, if the legitimate authority of the Crown finds only a proper scope for its exercise in civil matters, within the bounds defined by the terms of the constitutional compact, so in spiritual matters and questions connected with the law

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CHAP. V. divine, that authority should be asserted at least with equal if not with greater circumspection. The neglect of such caution is pregnant with many evils.

° Hor. Od.
iii. 6. 5-8.

“Dīs° te minorem quod geris imperas ;
Hinc omne principium, huc refer exitum.
Dī multa neglecti dederunt
Hesperix mala luctuosæ.”

“Those¹ emperors,” said S. Augustine, “we call happy who govern justly, who are not elated by tongues that extol highly, or obsequiousness that flatters humbly, but who remember that they are but men, and in promoting the worship of God subordinate their own authority to His Majesty.”

In order to meet some popular misconceptions, it has seemed desirable thus to clear the way by a few remarks pointing out that inner region within which the Royal Supremacy can exercise no legiti-

¹ “Sed felices eos dicimus, si iuste imperant, etc.”
De Civ. Dei, l. 5, c. 24.

mate authority. However, in real truth, this attribute of the Crown does only incidentally, and not absolutely, touch our subject and the means hereafter to be proposed for remedying the defects in the present system of Ecclesiastical Appeals. For the Judicial Committee is a *Statute Law Court* founded on an Act^p of Parliament, and does not, as the Star Chamber or Court of Review formerly did, derive its authority in any way from the source of Royal Supremacy. The real question in our present argument lies not between the Church and the Crown, but between the Church and the State of England.

CHAP. V.

^p 3 & 4 Will.
IV. 41.

III. *Distinct Jurisdictions of Church and State.*

BUT if this really is a question not between the Royal Supremacy and Church authority, but between the State and the Church, it will be right to consider, before

IAP. V. proceeding to suggest any remedy for the present grievance of Final Ecclesiastical Appeal, what is the broad distinction between the separate jurisdictions of those two bodies.

One of the disadvantages of the establishment of the National faith by law, overbalanced indeed by many signal and countervailing blessings, is, that the vulgar mind is wont to attribute the real sanctions for that faith to an inadequate and a wrong source. In many quarters, where one would expect to find better information, the doctrines of the Christian faith, as established in this land, are supposed to have been originally defined by State authority, and thence to derive their real title for acceptance. Now it would be difficult to conceive any misapprehension more gross than this, more pregnant with evil, or productive of more mischievous results. This is to attribute to the State that which by no means

belongs to it, but which by indefeasible, and, indeed, by divine right, appertains to the Church. CHAP. V.

The distinct jurisdictions, offices, and duties of those two very distinct organizations are eloquently described by the pen of S. Chrysostom, representing the State in the person of the monarch:—

“Distinct,”² he says, “are the limits of the temporal kingdom from those of the priesthood, nobler is the power of the latter. . . . The king must not be judged of by the gems which stud his apparel, nor by the gold with which he is adorned. His province is to rule earthly things, but the authority of the priesthood reaches to heavenly things; whatsoever ye shall bind on earth shall be bound in heaven. To the king are entrusted earthly things, to me heavenly things.”

And in another place the same thoughts are enforced in this language:—

² ἄλλοι ὅροι βασιλείας, κ.τ.λ.—S. CHRYS. *Hom. in Verb. Is. Vidi Dom.* p. 757. Paris, 1636.

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CHAP. V. “ To³ the king's authority are entrusted men's bodies, to the priest's their souls. The king remits their debts, the priest their sins. The one compels, the other exhorts. The one acts by force, the other by persuasion. One wields sensible weapons, the other spiritual. He wars against barbarians, I against the evil angels ; and the latter is the nobler exercise of power.”

The same broad distinction between spiritual and civil jurisdictions is marked out by S. Jerome under the same figure :—

“ The⁴ king governs the subjects whether they will or not. The bishop governs none but the willing. One keeps them in subjection by fear, while the other is in some sort their servant. The one holds men's bodies in custody for death, the other preserves their souls for life.”

Thus are the clear distinctions between the several jurisdictions of Church and State expressed in the forcible and glowing

³ ὁ βασιλεὺς σώματα ἐμπεπίστευται, κ.τ.λ.—*Ibid.* p. 758. Paris, 1636.

⁴ Ille (rex) enim nolentibus præest, hic volentibus, etc.—HIERON. *Epitaph. Nepotiani*, c. 7.

language of venerable antiquity. The conscientious or inner and the civil or external forum are the separate regions within which each finds a proper scope for its exercise. And their respective limits the first Christian Emperor carefully distinguished, of whose conduct we read in the words following: "*Ipse^p Constantinus curam Ecclesiæ dividebat in externam et internam. Hanc episcopis et conciliis relinquebat . . . externam sibi sumebat.*"

CHAP. V.

^p Mosh. Ecc.
Hist. p. 141;
Helms.

And while these separate jurisdictions of Church and State are thus distinguished from each other, the offices and duties of each are sufficiently definite within their proper spheres. No doubt much confusion on this subject exists in some minds; but still it seems, upon consideration, that such confusion does not result from the necessities of the case, but from lack of adequate information or due thought.

Sphere of the Church's Jurisdiction.

- CHAP. V. THE authority of the Church is rightly exercised in matters of faith and opinion, and over men's conduct respecting themselves and others as depending on that faith. Her authority extends over that region wherein the human mind moves, and so is exercised with spiritual weapons and "*pro salute animæ.*" "Matters^q spiritual," says Bishop Taylor, "should not be restrained by punishments corporal."
- ^q Works, vol. viii. p. 143.
- ^r Inquiry by an Impartial Hand, p. 109. "The^r Church's arms," wrote Lord Chancellor King, "were spiritual, consisting of admonitions, excommunications, suspensions, and such like, by the wielding of which she governed her members and preserved her own peace and unity. Now this is that which is called discipline, which is absolutely necessary to the unity, peace, and being of the Church. For where there is no law or order that society cannot possibly subsist, but must sink in its

own ruins and confusions." And it may be said that in a Christian nation the due exercise of Church authority, within its proper sphere, is not only advantageous to those of her own communion, but is of signal advantage to the whole commonwealth, for "unity" not kept in the Church is less kept in the State, and the schisms and divisions of the one are both mothers and nurses of all disobedience and disjoining in the other."

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* Laud's
Sermons, vi.
p. 176.

Sphere of the State's Jurisdiction.

BUT while it is clear within what sphere the authority of the Church in a Christian country finds proper scope for its exercise, it is no less clear that, in respect of religion, the State has also its own proper functions, and those, too, within certain bounds, which all antiquity and all reason assign. The State here adopts the faith of the English Church, and so its duties are to provide that that faith

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CHAP. V. should be taught, "to^t preserve inviolate

^t Bishop of
London;
Hans. 3 S.
vol. 111,
p. 606.

the original status of doctrine and discipline agreed upon by the Church and State, and to keep all Ecclesiastical Judges to the terms of that settlement and within the limits of their lawful jurisdiction."

^u Blacks. i.
235.

These duties are indeed sanctioned^u by the present Coronation Oath. The well-being of the whole community is involved in their proper discharge; for they are among the most necessary which appertain to civil authority. "Pure^v and unstained religion ought to be the highest of all cares appertaining to public regiment, as well in regard of the aid and protection which they who serve God confess that they receive at his merciful hands, as also for the force which religion hath to qualify all sorts of men and to make them in public affairs the more serviceable; Governors the apter to rule with conscience, Inferiors for conscience' sake the willing to obey." Indeed, a state can no more

^v Hooker,
Eccl. Pol.
v. 1.

exist happily and well without religion than an individual. Those are wise sayings of S. Augustine, "*Non aliunde beata civitas aliunde homo*" . . . "*Male vivitur ubi non de Deo bene creditur.*" We shall vainly look for prosperity and blessing where, even in civil government, man's eternal interests are not considered as well as his temporal ones. "*Nunquam^x res humanæ succedunt ubi negliguntur divinæ.*"

CHAP. V.

^x See Coke
Litt. 95.

But while it is eminently the duty of the State, within its proper sphere, to promote the faith which it adopts as true, it is equally its duty to abstain from interfering with that faith beyond its proper province. The distinction between the conscientious and civil forum, between authority in defining faith, and external co-active jurisdiction in promoting religion, is plain enough to any ordinary mind that will take pains to inform itself.

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IAP. V.

Dedicat.
terc.
ron.

“Utinam,” says Casaubon, “considerare principes vellent aliud esse sacerdotem agere, ex ambone Scripturas interpretari, Sacramenta administrare, in nomine Christi ligare et solvere, aliud auctoritate suâ prospicere, ut, quæ sunt sacerdotis, agat sacerdos.”

These two functions are very different. Within one sphere the Church is supreme, within the other the State. Any attempted usurpation of State authority by the Church is foolish and mischievous, any attempted usurpation of Church authority by the State is irreligious and profane. The State has proper functions, which it cannot discard without abandoning its duty to the people committed to its charge. On the other hand the Church has proper functions, which she cannot willingly surrender without abandoning her duty to God and religion, and in the words of S. Ambrose, when required by the younger Valentinian to give up the churches to the Arians, she may justly reply to all endeavours, come whence they may, to

rob her of that function which involves decision in questions of faith and doctrine,—“The^z Church,” said he, “is the house of God, and those things that are God’s are not to be yielded up and disposed of at the Emperor’s will and pleasure. His palaces he might grant to whomsoever he pleaseth, but God’s own habitation not so.”

CHAP. V.

^z Hooker,
Ecccl. Pol.
iii. 358.

IV. *Crown acts through Courts.*

Now there must be a clear understanding, as the present Court of Final Appeal, the Judicial Committee of Privy Council, is a Statute Law Court, and founded on an Act^a of Parliament, that the following suggestions for alteration in this system of judicature does not raise any new question between Church authority and the Royal Supremacy, because the remedies proposed, even if any of them were adopted, would leave that relation exactly as it stands at present. The sug-

^a 3 & 4 Will.
IV. 41.

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CHAP. V. gestions will merely have respect to the mode of proceeding in the Court itself, as now established.

^b Can. 36. The Crown, supreme “as^b well in all spiritual or ecclesiastical things or causes, as temporal,” acts by means of Courts specially provided for each jurisdiction.

^c Grot. de Imp. circa Sac. 240. “*Imperantis^c est non imperata facere, sed imperando facere ut fiant.*” And it is of the highest importance that the Courts appointed to wield the several jurisdictions should be constituted in the manner best adapted to secure competent tribunals.

^d Hooker, Eccl. Pol. iii. 355. “All^d men are not for all things sufficient, and therefore, public affairs being divided, such persons must be authorized judges in each kind as common reason may presume to be most fit.” How then can the best Court through which the Crown may act for the purposes in hand be best constituted? That is the question before us.

V. A mixed Court undesirable.

As a preliminary matter it may first be said CHAP. V.
what such a Court should not be. 1. It
should not be, at least if the principles
above laid down are true, such a Court
as we have at present—a purely lay tri-
bunal. 2. It^e should not be a mixed
Court of ecclesiastics and laymen sitting
together in common as judges of fact,
law, and faith. That would perhaps be
worse than the present statutable system.
The association of ecclesiastical members
with a Civil Court on the one hand, or
the association of lay members with an
Ecclesiastical Court on the other, are but
clumsy and most unsatisfactory expedients,
neither warranted by primitive practice
nor supported by any worthy example,
nor consistent with ecclesiastical propriety,
nor calculated to produce harmonious re-
sults. From such connections there can-
not but be generated a hybrid and ill-

^e See Marc
Lansdown's
Speech;
Hans. 3 S.
vol. 111,
p. 628.

CAP. V.

favoured progeny, which it must be said the records of our past history do not commend at all hopefully for adoption. In such a tribunal the legal and theological mind would consort but ill together. Questions of law unfamiliar to the one, and of doctrine unfamiliar to the other, might lead to some very complicated perplexities touching the subject-matter on which both in common would be exercised and confused. Moreover, with all due regard to the mental powers and attainments of my own order, one is not quite sure that the long practice in judicial investigations, and the polished acuteness and subtle perspicacity of those with whom ecclesiastics would be associated in such a Court might not secure an over-balance in the scale against them, and obtain undue preponderance in turning a final judgment. And it is also quite likely that those divines to whom such a scheme might commend itself would not

be the last to find themselves hopelessly prostrate in the stronger grasp of their more powerful associates. CHAP. V.

There is a still graver objection, however, to such a mixed Final Appeal Court. From the presence of ecclesiastics it would have at least the semblance of authority to define faith and doctrine. Now such a function can never be permitted to belong to any Court whatsoever, by any man who understands and honours the original constitution of the Church, or of that branch of it now existing in these realms. Synods alone have the power of defining doctrine, and to grant even a semblance of such a power to any other authority whatsoever would be a most unwarrantable and most mischievous course.

VI. "*Cuique in sua Arte credendum*" a
Principle of English Jurisprudence.

BUT let us see if a remedy for the present disorder might be found in close analogy

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CHAP. V. with all our constitutional proceedings in matters of judicature ; whether a system might be adopted by which the Judicial Committee, as at present constituted, might give judgment in the last resort, and yet the due authority of the Church be preserved inviolate in matters of faith and doctrine.

There is a legal maxim, "*Cuique in sua arte credendum*," in pursuance of which, when any matter comes before a Court which is not competent, for want of knowledge, to decide, it refers for advice and guidance to those who are. Lord Denman's words, delivered in the Court of Queen's Bench, illustrate this maxim. They are as follow :—

"There is a general rule that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and I think it *is not confined to unwritten law, but extends also to the written laws, which such men are bound to know*. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, *but its effects*,

and the state of the law resulting from it. The mere contents indeed might often mislead persons not familiar with the particular system of law, the witness is called upon to state what law does result from the instrument." CHAP. V.

Now this wise statement, that the mere contents of the written law, if unfamiliar, might without further elucidation mislead the judicial mind, should be carefully considered by those who say that a civil Court is competent to decide a spiritual question because it has the written formularies before it which define the doctrine. Such a view is certainly not consistent with the conviction of the learned judge above quoted.

Again, Lord Langdale delivered his judgment on the same subject as follows :—

“ With foreign laws an English judge cannot be familiar; there are many of which he must be totally ignorant. There is in every case of foreign law an *absence of all the accumulated knowledge and ready associations which assist him in the consideration of that which is the English law, and of the manner in*

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CHAP. V. *which it ought to be applied in a given state of circumstances to which it is applicable. . . .* Difficulties are obvious enough, even in cases in which he may have before him the very words of that which has been proved to have been the law applicable to the event in question. . . . The rule of English law, that no knowledge of foreign law is to be imputed to an English Judge sitting in a Court of only English jurisdiction, is undoubtedly well founded. And as cases arise in which the rights of parties litigating in English Courts cannot be determined without ascertaining, to some extent, what is the foreign law applicable in such cases, the foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to the judge, must be proved as facts are proved, by appropriate evidence, *i. e.* by *properly qualified witnesses, or by witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question."*

The principles thus laid down are summed up in the following learned opinion:—

“ Our^f Courts do not take judicial notice of any foreign laws, and when a question of foreign law arises, either in Chancery or before the Common Law Courts, it is dealt with as a question of science to be proved, like matters of fact, by the testimony of witnesses practically conversant with the subject. The principle and mode of proof is exactly the same, whether the question be one of chemistry, or of mechanics, or of French law. . . . The evidence on which (our Courts) proceed is the sworn opinion, orally delivered, of a person learned and experienced in the foreign law.”

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^f From a learned opinion; Hans. 3 S. vol. 111, p. 614.

The very same principle,—“ *cuique in sua arte credendum*,”—is adopted in our jurisprudence, as regards the proceedings of our Courts, when dealing with the several branches of our domestic law :—

“ When^g a disputed question of Common Law arises in the course of a Chancery suit, and is necessary to be disposed of before the suit can be finally disposed of, it is the practice of the Court of Chancery either to direct the parties to try the question in an action to be brought by one of them against the other for that purpose in a Common Law Court, or to order a special case to be stated and sent to a Common Law Court for the purpose of obtaining the opinion of that Court on such question.”

^g Ibid.; ibid. p. 613.

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The same principle, again, guides the High Court of Admiralty, when questions come before it to be decided according to the rules of nautical science, the Judge of that Court calls to his assistance some of the Elder Brethren of the Trinity House skilled in naval affairs, by whose opinion his decision is governed.

And to come more directly to our own subject, when a question of the law divine arises in a Common Law Court, that Court surceases from proceeding till the question has been decided by an Ecclesiastical Judge.

¹ See HANS.
³ S. vol. III,
p. 616.

An^h analogous course is pursued in Scotland. The decision of spiritual questions is left to the Courts of the Kirk, which are presumed to be alone competent to deal with them. In Silesia and the Rhenish provinces of Prussia, questions of false doctrine, wherever arising, are referred to the authorities of the Church. Such is the course even where

the Roman Catholic religion is not established : of course, where it is, the principle contended for is adopted. CHAP. V.

VII. *This Principle applicable in the Case before us.*

Now it would seem, upon consideration, that this principle,—“*cuique in sua arte credendum*,”—universally followed in our national jurisprudence, excepting in the unfortunate case specially before us, might wisely be extended to that also, and might supply a cure for those grievous disorders of which complaint has above been made. Such¹ a course was eloquently commended to the House of Lords by Lord Derby in 1850, and it received also the commendation of Lord Brougham in the following words :—

“ How^j can lay judges arrive at the soundest decisions on doctrinal questions? Why, just as the judges arrived at sound decisions upon questions of rights of patent, of chemistry, of optics, of mechanics,

¹ Hans. 3 !
vol. III,
p. 652.

^j Ibid. p. 63:

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CHAP. V. or any other science. They would form their own opinion upon the evidence of the most skilful and learned men upon these several subjects, and he contended it might be just the same with theological doctrine. The doctrines of the Church of England were prescribed by the Act of Uniformity, by her Articles, her Liturgy, and her discipline. He would have questions upon these doctrines decided by the Judicial Committee, upon the evidence and the opinions of such learned men as were brought before them."

If then the Judicial Committee, charged, as at present constituted, with the duty of giving judgment in the last resort in causes ecclesiastical, was to send an issue to be tried by the Spirituality, on any particular question of faith and doctrine involved in the case before it, such a course would be analogous to the whole system of our national jurisprudence, would save the Church from that ignominious position in which she is now placed, by having her doctrines and faith defined by a lay tribunal, and would put an end to

a solœcism which discredits this nation in the face of Christendom. CHAP. V.

It is very observable, at this point, that the principle now under view governs, with reference to civil matters, the enactments of the Judicial Committee Act^k itself. And therefore the adoption, in spiritual matters, of the course above suggested would only be carrying out to its legitimate extent the expressed intention of its framers, when dealing with those subjects to which, at least in their minds, that Act was certainly confined. This principle is thus adopted in the statute :—

^k 3 & 4 Wⁱ
IV. 41.

“ And^l be it enacted that it shall be lawful for the said Judicial Committee to direct one or more feigned issue or issues to be tried in any Court of Common Law, and either at bar, before a Judge of Assize, or at the sittings for the trial of issues, in London or Middlesex, and either by a special or common jury, in like manner, and for the same purpose, as is now done by the High Court of Chancery. . . . And^m be it enacted that it shall be lawful for the said Judicial Committee to direct one or more

^l Ibid. s. 1

^m Sec. 13

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CHAP. V. new trial, or new trials, of any issue, either generally
Sec. 15. or upon certain points only. . . . Andⁿ be it enacted that the costs incurred in the prosecution of any appeal or matter referred to the said Judicial Committee, and of such issues as the same Committee shall under this Act direct, shall be paid by such party or parties . . . and in such manner as the said Committee shall direct."

Here, then, is the principle above mentioned, which generally governs the jurisprudence of England, specially adopted in this very Act which constituted the Judicial Committee. And if it was enacted that in civil matters the Court should have statutable means of informing itself by application to external sources of instruction, surely in spiritual matters, with which it is even less familiar, the same course could not reasonably be deemed improper or inconvenient.

VIII. *An Objection.*

AN objection, however, has been here raised, that if an issue on faith and doc-

trine was to be sent for decision by the Spirituality from the Court, it might fail to propound accurately the precise point in question. Now this, it must be confessed, is the very oddest objection imaginable, at least as coming from any man who would maintain the present state of things. For if the Court was incapable of stating exactly the subject-matter in discussion, it could hardly be considered competent, without assistance, to give final judgment in the case. It must, however, be said that every one of information must have far too high an opinion of the acuteness and perspicacity of the Court to imagine that any such objection is at all considerable. Those most learned and accomplished persons who adorn that tribunal would, doubtless, frame their questions with perfect clearness and accuracy, as well as with precise adaptation to the matter in hand. However, should any difficulty be foreseen on this head, it is

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CHAP. V. observable that the first section of the
3 & 4 Will. Judicial Committee Act empowers^o the
V. c. 41. Crown to nominate two extra members
. I. of the Court, being Privy Councillors.
These, for the occasion, might be spiritual persons, charged with the duty of framing the questions to be referred. One inclines, however, to the opinion that this would be entirely unnecessary for the reasons before specified ; and even further, would be undesirable, as constituting a Court of that mixed character which above^{oo} was represented as being on many accounts objectionable.

^o p. 171-3.

IX. *A Second Objection.*

BUT a second objection, and that of a far more reasonable and more formidable character, has been raised to the plan of sending issues from the Judicial Committee on matters of doctrine to the Spirituality, whose answers should serve to govern the judgment of the Court. And

this is an objection which was forcibly put before the House of Lords, in 1850, by the Marquis of Lansdowne:—

“Every^p Privy Councillor,” said his lordship, “was required to take an oath that upon all questions that came before him he would speak his mind and act according to the decision of that mind, but how was he to do so if . . . a decision was sent to him which was to be binding and conclusive, and with regard to which he had no option except that of recording such decision as binding upon the Crown? The agency of a body which was assumed to possess some dignity—the Privy Council—was to be employed for the mere ministerial purpose of sending questions in the first instance . . . and receiving the decision . . . without being able to touch or alter the judgment, whatever the opinions of the Council might be upon the subject.”

^p Hans. 3 S.
vol. 111,
p. 623.

The^q same objection was urged by Lord Brougham also with much earnestness. And if, under the circumstances supposed, the answer returned to the question proposed to the Spirituality were to be absolutely binding on the

^q Ibid.
p. 630-635.

CHAP. V. Judicial Committee, this objection might appear to some persons to be quite insurmountable.

But if the same principle which governs the proceedings of the Court of Chancery, when sending special cases to Common Law Courts, were adopted in this instance, the whole force of the objection would be obviated. The Court of Chancery sends for guidance and instruction only. It may disregard the instruction given if so it pleases:—

^r From a learned opinion; Hans. 3 S.vol.III, p. 613.

“The^r Lord Chancellor is not bound to act on the opinion certified by the judges in answer to a special case, but may, and often does, send a second case, stating the same question, to a second Court of Law, and even a third case to a third Court.”

Lord Eldon was wont to recount, with some satisfaction, that he once had a question before him in Chancery, whether an estate was in fee, for life, or in tail; and he asked for the opinions of the Common Law Courts on the subject.

One Court said the estate was in fee; CHAP. V.
the second Court said it was for life;
and the third Court said it was in tail.
“Whereupon,” added his lordship, “I
decided that there was no estate at all;
and I had the unanimous concurrence of
all Westminster Hall.” Whether in that
concurrent unanimity were included the
opinions of all those learned judges, be-
tween whom and the Lord Chancellor
there appears, at least to the unprofes-
sional mind, to have existed so consider-
able a discrepancy of conviction, may be
a query. However, one may hence con-
clude that the Court of Chancery is not
absolutely tied down to decide in accord-
ance with the advice and instructions ten-
dered.

In like manner the answers of the Spi-
rituality and their advice on questions of
faith might be returned to the Judicial
Committee without being absolutely bind-
ing on their ultimate judgment in the

CHAP. V. particular case. But as in theory a Judge in Chancery may refuse to act upon the opinions returned to him, yet practically, save in the most isolated exceptions, he makes them the foundations of his decree; as the House of Lords may decline to be guided by the opinions of the majority of the judges, when called in to give counsel, yet practically, and as a general rule, they are adopted; so, in the case of any answer on a matter of faith returned by the Spirituality to the Final Court of Appeal, one may share in the firm conviction expressed by Lord Derby, that "in* ninety-nine cases out of one hundred the Judicial Committee would be directed by the opinion . . . upon questions of doctrine in precisely the same manner."

* Hans. 3 S.
vol. III,
p. 652.

However, even supposing that in any case, which is highly improbable, the Final Appeal Court felt itself conscientiously constrained to discard the instructions

given by the Spirituality, its judgment CHAP. V.
could then in no way, as is now unhappily the case, be supposed to affect the doctrine of the Church. That would then stand out perfectly clear from the facts and law of the case under hand, free from that confusing admixture which is now painfully embarrassing. The doctrine would then be stated distinct from the decision of the civil tribunal, the answer returned would be, at least for the time, a representative expression of the national faith, irrespective of the particular event of the contention under hand. And this would be a signal advantage.

X. Who are the Spirituality?

AND now we come to one of the most difficult questions connected with this subject. It will have been observed that hitherto the principle of submitting doctrinal questions for solution to the Spirituality has been commended generally,

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CHAP. V. without any specification of what that Spirituality should consist. It will be of course admitted that the very highest attainable spiritual authority for such a purpose as that before us should be secured.

¹ Hans. 3 S.
vol. III,
p. 657.

“The Standards,”¹ said Lord Harrowby, when speaking on the subject of the doctrine of the English Church, “were constructed, after due deliberation, by all orders of the Church combined, and ultimately received the sanction of the State as an important portion of the Church. Our business now is simply to interpret, not to construct. Let us take care that under the guise of interpretation the work of construction or legislation is not undertaken by inferior authority to that which originally established.” That this danger may be avoided it would be very desirable to have for interpretation in Final Appeal, if not the original authority, at least the representation of the original authority, which was at the outset charged with construction.

For this reason, among many others of considerable weight, to refer questions of interpretation to the Bench of Bishops would not be any way satisfactory. For that august body have clearly no power whatever, according to the constitution of the English Church, of original construction. Indeed, Lord Lansdowne pointed out to the House of Lords the inconvenience of excluding the second order^u of the clergy from such deliberations as those under view. And Lord Harrowby reminded that Assembly that for such purposes "other^x orders than the Episcopal always took a considerable share." Against the Bishop of London's Bill, in 1850, which proposed to refer these questions to the Episcopal Bench alone, the most reasonable objections were urged on this very ground.

But if a reference to the whole Episcopal Bench would be unsatisfactory, much less satisfactory would it be to refer

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^u Hans. 3 S.
vol. 111, p.
626.

^x Ibid. p.
654.

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CHAP. V. such questions to any standing board of bishops. If the first course would be a strain on the constitution of the English Church, the last would be a greater still. Lord Brougham spoke words which will meet with a hearty response in most minds when he said, "He' should be decidedly opposed . . . to any proposition for giving the minister of the day a power to select particular bishops to advise the Committee of Privy Council."

7 Hans. 3 S.
vol. III,
p. 653.

And far worse still would it be if particular prelates should be chosen for particular cases. Nothing can be conceived more indefensible, whether in Church or State, than a selection of persons charged with judicial functions, *pro hac vice*, in any Court whatsoever. That must ever lead to hardships and abuses quite intolerable, as some passages in our country's history most unanswerably testify. In words, to which every reasonable man will cordially assent, Lord Derby

expressed his opinion on this subject, when he said, "I^x certainly should object to refer to the discretion of any party, to the discretion of the Judicial Committee of the Privy Council, or the Minister of the day, that selection of the Archbishop or Bishops for the guidance and direction of the whole Church." And then, as suggesting a better alternative, his lordship said, in words before quoted, "Of this I am quite sure, that it would be a matter of satisfaction to the great body of Churchmen in this country if they knew that upon any question raised they had an opportunity of obtaining, not the direction of the judges, not the direction of the legislature, but for their own guidance, as dutiful members and sons of the Church, the authoritative declaration of the united heads of the Church in matters affecting doctrine."

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^x Hans. 3 S.
vol. III,
p. 653.

*XI. United Convocations forming a
National Synod.*

CHAP. V. Now this clearly, for the purpose before us, is the object to be obtained—the interpretation of documents, as before said, by an authority not inferior to that charged with their original construction, or at least by a proper representation of that authority. And how is this end to be secured? “I’ know,” said the late Bishop of London, in his most learned and exhaustive address to the House of Lords on this subject, “what would be the constitutional mode of carrying these purposes into effect; namely, to permit the Church to deal synodically with questions of heresy and false doctrine.” And this would be a course to which, at least constitutionally, no objection whatever could be made, that the Privy Council should seek instruction on any point of doctrine arising before it from the united Synods of Can-

7 Hans. 3 S.
vol. III,
p. 606.

terbury and York. They were originally charged with the power and duty of construction ; and they, united as a National Synod, certainly would be an unexceptionable authority for interpretation. And though they usually sit at different times and in different places, yet they have been and might be united as a National Synod for such a purpose, in accordance with the following Canon of the Council of Windsor, A. D. 1072 :—

“ Ita² ut si Cantuarensis Archiepiscopus Concilium cogere voluerit, ubicumque ei visum fuerit, Eboracensis Archiepiscopus sui præsentiam cum omnibus sibi subiectis ad nutum ejus exhibeat, et ejus canonicis dispositionibus obediens existat.”

2 Conc.
Mag.Brit. 1.
324-5.

And it is observable that this Canon has not only the force of Ecclesiastical, but of Statute Law also. For by 25 Hen. VIII. 19, it was enacted that all Canons, Constitutions, Ordinances, Provincial and Synodal, made before the date of that Act (1534), “ which^a be not contrariant

^a Sec. 5.

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CHAP. V. nor repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal," should remain in force until such time as the Ecclesiastical Law should be otherwise ordered or determined. Such review has never been completed; this Canon does not fall within the provisos first specified, and therefore is at this moment not only a lawful Canon of the Church, but an integral part of the Statute Law of England.

For directing the proceedings when the two Convocations should be united in a National Synod specific regulations were laid down at the Council of London,^b A.D. 1075, where the matter was discussed and decided in accordance with the tenor of some ancient Canons of Toledo, Milevis, and Bracara, and after consultation with aged and experienced men who could then remember the former practice of the Anglo-Saxon Church. And

^b Conc.
Mag. Brit. I.
363.

these regulations were on subsequent occasions adopted. On arriving at the church where the National Synod was convened, and where previous preparations were sometimes made by providing seats, rising in the form of steps^c from the ground, the members took their places in prescribed order. The Archbishop of Canterbury, as President, occupied the chief seat. On his right was placed the Archbishop of York, on his left the Bishop of London; next the Archbishop of York sat the Bishop of Winchester. But if the Archbishop of York was absent then the Bishop of London sat on the right of the Archbishop of Canterbury, and the Bishop of Winchester on his left. After these prelates had taken their places the other bishops took theirs according to the dates of their respective ordinations^d [? consecrations]. As soon as all had been seated and silence obtained, the Gospel “ *I am the good Shep-*

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^c Conc.
Mag. Brit. I.
648.

^d Ibid. 363.

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- CHAP. V. *herd*"^e was read, collects were offered up, and the hymn "*Veni Creator*"^f sung. Then followed a sermon ;^g on its conclusion the Archbishop detailed the causes^h for which the National Synod was convened, and the necessary forms of business were introduced by official persons which was discussedⁱ by the whole assembly.
- ^e Conc. Mag. Brit. 1. 648.
^f Ibid. 649.
^g Ibid.
^h Ibid. 3. 851.
ⁱ Ibid.

These details are here specified with a view of showing that the union of the two Convocations in a National Synod is no new imagination, but that it is contemplated in the early Constitution of the English Church. And indeed such a course has been pursued on many occasions of which we have records, amounting to about forty since the Conquest.

I am well aware it may here be objected, first, that to unite the two Synods of our country for such a purpose as that before us would involve cumbrous machinery ; and secondly, that it would interpose delay to a return of any opinion

required by the Court which might seek it. As regards the first objection, it may be answered that, as a final appeal on a matter of faith and doctrine, in which the whole Church of this realm and the nation itself is, or should be, deeply concerned, involves the most grave and solemn questions which can be debated, so it should be dealt with in the gravest and most solemn manner which the constitution of this Church and realm is capable of securing. As regards the second objection, some delay would seem, upon consideration, to be no evil at all, but rather an unmixed good. For it is most desirable that questions involving final decision in matters of faith and doctrine should not be hurried on in times of party heat and excitement, but that the amplest time and opportunity should be allowed for calm and dispassionate consideration.

XII. *Canterbury Provincial Synod, with
York Representatives added.*

CHAP. V. HOWEVER, if objections by such as are best qualified to judge should appear so formidable as to render the foregoing method at the present time impracticable, there is still another plan by which the same end might be secured in accordance with constitutional principles and the practice of the Church. If the judgment of the united Synods—the authority for original construction—could not be thus obtained for interpretation; yet at least the representation of that authority might be secured by a simple arrangement. The system of acting by delegation has always been adopted to a much greater extent in ecclesiastical matters than in civil ones. To act “*per viam compromissi*” is a principle constantly recognized in the former. In one of the most important passages of our ecclesiastical history we find repre-

representatives of the Northern Synod charged with full power of acting for that assembly in the Southern. When our present Prayer-book was compiled, representatives, duly authorized by the York province, appeared in the Canterbury Convocation, delegated by the Convocation which they represented to dissent from the proceedings, or to assent to them. And this principle of delegation is so completely interwoven into the system of the Church, that a Proctor, who is the representative of diocesan clergy,^k though himself a delegate, may substitute another to vote in his place; for though in civil matters there is a general principle of common law, "*Delegatus delegatum substituire non potest*," yet in matters ecclesiastical^l the contradictory proposition is certainly true.

^k Hody, p. 388.

^l Atterb. Rights, &c. p. 58.

In accordance with this principle, then, representatives from the province of York might be delegated to sit in the Canter-

CHAP. V. bury Convocation, and to that assembly, thus fortified, doctrinal questions might be referred by the Judicial Committee.

XIII. *Joint Committee of Canterbury and York.*

OR yet, again, if a Synod thus constituted was considered too large a body for the purpose before us, it might, in accordance with the principle of representation above mentioned, perhaps be thought a more easy plan that each of the two Provincial Synods should appoint, at the assembling of every new Convocation, representatives to form a united Committee, to which questions on interpretation of faith and doctrine might be submitted by the Judicial Committee of Privy Council. It might perhaps by many persons be considered that such a body, as being of more manageable size than a Synod, would be better adapted to the desired end, and that the duty

required would be thus more easily and expeditiously performed than in a larger assembly. And it may be added that this principle of an appointed ecclesiastical tribunal for the purpose before us, (though not appointed in this way,) received the commendation of Lord Brougham,^m when he addressed the House of Lords on this subject. How such a Committee should be constituted it hardly becomes an individual to express an opinion, as that matter should be dealt with by the united wisdom of the two Convocations. However, a suggestion, but merely a suggestion, is thrown out in a note⁴ for the consideration of the reader.

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^m Hans. 3 S.
vol. III,
pp. 632-3.

⁴ If the two primates were *ex officio* members of such Committee, and two bishops were elected by the Upper House of Canterbury, four presbyters by the Lower, one bishop by the Upper House of York, and two presbyters by the Lower, a body of eleven divines would thus be constituted, fairly representing the two Provincial Synods, and to which the interpretation of the Church's documents might be safely

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XIV. *Objection I.*

It may now be desirable to glance at some objections which will occur here, for indeed they can never be avoided in any

entrusted. It will be observed that, according to the foregoing supposition, the elected representatives of the clergy in each province, when compared with the bishops, are as two to one. But this proportion is in imitation of primitive example. In the *tractoriae* or letters of summons to the first Synod of Arles (314), Chrestus, Bishop of Syracuse, was desired to bring with him two of the second* throne, *i.e.* two presbyters. And, in accordance with such venerable practice, it is the usual habit in the English Church, when joint Committees of the two Houses of Convocation are named, that for every one member of the Upper House two members of the Lower House should be appointed. It is also observable, on this head, that when the representatives of York signed the ratification of our present Prayer-book in the Canterbury Synod, the names of three prelatesⁿ and six clergy were subscribed, numbers which accord with the proportion above specified.

ⁿ Nichols,
Pref. to Book
of Common
Prayer, p. 12.

* συζεύξας σεαυτῷ καὶ δύο γὰρ τινὰς τῶν ἐκ τοῦ δευτέρου θρόνου.—
Eus. *Eccl. Hist.* l. x. c. v.

human managements whatsoever. "It is true," said Lord Harrowby, on this subject, "that it is difficult to secure practically the separation of these two functions, it is true that he who interprets is apt, in fact, to legislate." And so it may be objected that this Committee might by a decision trench too nearly on the confines of creating a new doctrine. But, to use the Bishop of London's words, "it^o is enough to say, in answer to this objection, that no power will be possessed by the new Court which is not possessed by the present. Supposing that it was in contemplation" [which it is not] "to invest any persons with the power not simply of determining of any particular opinion, whether it be consistent with the Church's doctrine, (which is all that the Court of Appeal will have to determine,) but of framing new doctrines, surely (such a Court) would be more competent to exercise that power than the

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^o Hans. 3 S.
vol III,
pp. 616-7.

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CHAP. V. Court as at present constituted." Or the objection may be answered in Lord Derby's words, "He^p should much regret if either the one tribunal or the other had the power of establishing new articles of faith; but if he were to choose which of the two should have the power to bind the Church, of which he was a humble and unworthy member, he could not hesitate to take the power from a body who might not be members of the Church and confer it upon those members of the Church who were authoritatively set forth as the spiritual guides and instructors of the Church." However, the objection is no way a valid one, because the supposed Committee would not be charged with the duty of construction, but only of interpretation; and should the members transgress the limits of their appointment, they would be certainly amenable to that authority which while conferring had so restricted their functions.

P Hans. 3 S.
vol. III,
p. 650.

Objection II.

ANOTHER objection which might occur is founded upon the possibility^q of a difference of opinion among the members of the Committee. But this objection lies equally against the present Court, and indeed against all Courts whatsoever in which more than one member is charged with authority—in Lord Redesdale's words on the subject, "Was^r a probable difference of opinion any argument against the establishment of a Court?" It is clear that if this objection were to prevail no Court could be permitted to exist, except such as was presided over by a single judge, and that is an alternative which few persons would be willing readily to accept.

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^q See Marquis of Lansdowne's Speech; Hans. 3 S. vol. 111, pp. 625-6.

^r Ibid. 641.

Objection III.

THE last objection which may be raised, and to which I shall only advert in passing,

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CHAP. V. is that the interpretation of legal instruments involving faith and doctrine would thus be entirely removed from the hands of the laity and placed in those of the spirituality. But, as the main object of these pages is to recommend that course, I cannot be expected to admit this as a valid objection, but I rather believe that such an effect would be an unmitigated advantage, and now express an anxious hope that, if any reader of these lines should be found, he will have seen reason to join in that belief.

Some arrangement, as above proposed, with such modifications as more competent persons than myself might suggest, would surely secure the rights and privileges both of Church and State, and would place a very important branch of our national judicature on a firm basis, free from those defects at the very foundation which weaken and endanger the whole superstructure. "It^s retains," to

^s Hans. 3 S.
vol. III,
p. 617.

conclude in the words of the late Bishop of London, "the laity in the exercise of their proper and legitimate functions. It will not displace the members of the Judicial Committee from their office as judges of fact, judges of the law and of the rules of justice, but they have to take their measure of true or false doctrine from those who, I am bold to say, are more competent than themselves to judge of such questions. . . . By the fundamental principles of the Church of England all its different members, laity as well as clergy, have certain rights and certain duties, upon the faithful discharge of which the safety and efficiency of the Church itself depend. There are common duties to be performed by all, but there are also particular duties to be performed by particular members, and they are not to interfere with one another."

XV. How the desired Change could be constitutionally effected.

CHAP. V. IT now remains only to inquire how this desired change in our national jurisprudence could be constitutionally effected. And here as two distinct organizations are concerned—the Church and the State—it is necessary to consider the measures required for securing the end in view by the friendly co-operation of both. And first of the Church.

XVI. As regards the Church.

WHETHER it might be, upon due consideration, deemed right that questions involving faith and doctrine should be referred by the Judicial Committee to a National Synod; or to the Provincial Synod of Canterbury assisted by representatives from that of York; or to a Committee composed of representatives from both Synods; in each of these cases

there is a course perfectly familiar to the constitution by which the needful preliminary arrangements, as regards the Spirituality, could be easily and satisfactorily carried out. CHAP. V.

By Royal Letters of Business.

ROYAL Letters of Business would be directed from the Crown, requesting the two Convocations to take the necessary measures for the purpose proposed. And here a word must be interposed on the instruments mentioned—Royal Letters of Business—because the most strange and unaccountable misapprehensions prevail in many minds on this and some cognate subjects connected with the relations between the Crown and the Synods of England. The matter, however, is so plain and so distinctly defined by the constitution that it cannot but be cause for some surprise that any mistakes whatever should have arisen. There are four distinct and

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^t Rot. Vafcon. 22 Ed. I. m. 4. d. 1; Parl. Writs, vol. 1, p. 25; Wake's App. 218; Pearce, Law Conv. p. 54.

^u Att. Rights. Add. 642; Wake's State App. 237-9; Wake's Auth. Ch. P. p. 371.

^x 25 Hen. VIII. 19.

^v Gib. Cod. pp. 994-5.

^z Wake's State App. 239; Pearce, Law Conv. p. 106; Card. Syn. pp. 776, 777; Ibid. pp. 818, 819.

It is this last instrument which would be required for the purpose under view. Such a document has been constantly issued, containing the expression of the Sovereign's wishes that some particular business should be transacted by the Synods. Modern examples of such instruments may be found in the years 1661, 1710, 1714, 1715. And as they have

been ever dutifully attended to, so not only with respectful duty, but with becoming gratitude, it is certain that Royal Letters of Business on the subject before us would be received and obeyed. It is equally certain that the issue of such documents by the Crown in this case would be in perfect harmony with constitutional precedent, and would graciously redeem this pledge given in the royal declaration prefixed to the Articles of Religion, that “if^a any difference arise about the external policy, concerning the Injunctions, Canons, and other Constitutions whatsoever thereto” (the Church of England) “belonging, the clergy, in their Convocation, is to order and settle them.”

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^a Royal Dec.
Art.

XVII. *As regards the State.*

THE next question which arises respects the needful measures to be taken by the State for securing the object in view.

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By Act of Parliament.

CHAP. V. As was before said, an endeavour was made to secure a somewhat like relief for the Church by a Bill introduced into Parliament in the year 1850. Her appeal was then refused. Would a similar application at the present time meet with a more generous response? Is there room for hope that a kindlier welcome would be now accorded to any well-considered proposition for this union of Spiritual and Civil judicature? Would the poet's language be realized in the legislative answer to the Church's request:—

Virg. *Æn.*
ii. 321, 322.

. . . . " *fœderis*^b *æquas*

Dicamus leges, sociosque in regna vocemus?"

Or, on the other hand, would it be rejected with scorn or treated with contempt? That is a grave question, though one feels some confidence that the British legislature would never persistently turn

a deaf ear to a real grievance if clearly CHAP. V.
proved and respectfully represented.

By Order in Council.

IT is, however, by no means certain that an Act of Parliament is in any way necessary for this purpose. It may turn out, upon inquiry, that ample powers have been already granted by the legislature for securing the ends in view, and that the statutes of the realm, as they now stand, contain enactments sufficient for the purpose.

In the statute^c which transferred Ecclesiastical Appeals, in 1832, from the Court of Delegates to the Privy Council, it is enacted that from that date such appeals shall be made “*to^d the King’s Majesty, his heirs, or successors in Council . . . subject to such rules, orders, and regulations for the due and more convenient proceeding . . . as his Majesty, his heirs,*

^c 2 & 3 Wil IV. 92.
^d Sec. 3.

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1AF. V. *and successors shall, from time to time, by order in Council, direct.*" Now here power is given to the Crown, in distinct terms, to make rules, orders, and regulations *by Orders in Council* for the due and more convenient proceeding in such appeals before the Privy Council. The question then is, has this power been taken away by the subsequent Act^e of 1833, which transferred these appeals from the Privy Council to the Judicial Committee? And it must be said that there is no trace whatever in the later Act of any repeal of that power which the former granted to the Crown, of making rules, orders, and regulations by order in Council, for the due and more convenient proceeding. Thus upon the principle "*ut res magis valeat quam pereat, both acts being affirmative,*" and the substance, "*such^t that both may stand together . . . they shall both have a concurrent efficacy.*" Therefore the above-mentioned provision of the first Act would

3 & 4 Will.
7. 41.

Black.
im. I. 89.

still abide in force, even if the second statute did not in the present case specially provide that “nothing^s in this Act contained shall . . . any wise alter the constitution or duties of the said Privy Council, except so far as the same are expressly altered by this Act.” Consequently, in accordance with the general principles of legal construction, the power by an Order in Council of making orders and regulations for the more convenient proceeding in these appeals still remains. And in the exercise of this power, positively conferred by statute, an Order in Council might be published directing the Judicial Committee to refer questions connected with faith and doctrine to the Spirituality for decision.

And indeed, to proceed one step further, not only does this power remain as conferred by the first of the two statutes in question, the second contains an enactment which is directly to our purpose, and really seems, upon consideration, ex-

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§ 3 & 4 Wil
IV. 41. s. 21

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The seventeenth section runs thus :—

3 & 4 Will.
c. 17. “ And^h be it further enacted that it shall be
lawful for the said Committee to refer any matters
to be examined and reported on . . . to such . . .
person or persons as shall be appointed by his Majesty
in Council, or by the said Judicial Committee, in
the same manner and for the same purposes, as
matters are referred by the Court of Chancery to
a Master of the said Court.”

XVIII. *Conclusion.*

IN consideration of the foregoing facts,
it would seem that the desired reform
might be constitutionally obtained, so as
to satisfy the due requirements of the
constitutional compact, and to secure the
respective rights both of the Church and
State, by two courses of proceeding, either
1. by a short declaratory A& of Par-
liament, or 2. by an Order in Council,
and in each case by Royal Letters of
Business to the Convocations of Canter-
bury and York.

In these days of political excitement and party contention it is difficult to secure the attention of statesmen to any subjects which do not excite strong expressions of public feeling or elicit violent explosions of clamorous outcry. But there are subjects no less important than those to the well-being of this nation, lying at the very foundation of her most sacred interests, and stirring to the very bottom the hearts of her most loving and most dutiful people. He would be a prudent statesman and would earn no small meed of worthy gratitude who should, in the matter now before us, carry through any plan for satisfying at the same time the requirements of the State and the conscience of the Church, consigning in the last resort the correction of offences to the civil power, and meanwhile providing for the due interpretation of the national faith by those to whose guardianship it has been by God committed.

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Such a one would free the Church of this nation from galling fetters in which she is now ignominiously bound, and would restore the supremacy of those principles which alone can ensure an abiding union between a Christian Church and a Christian State. They are enforced by a divine command, “Renderⁱ therefore unto Cæsar the things which are Cæsar’s, and unto God the things that are God’s.” They are touchingly commended in the words of King Edgar to Archbishop Dunstan, “I^k bear the sword of Constantine, you the sword of Peter; let us then join our right hands, ally sword to sword, that the lepers may be cast out of the camp, the sanctuary of the Lord cleansed, and that the sons of Levi may minister in the temple.”

ⁱ S. Matt.
xxii. 21.

^k Conc.
Mag. B. I.
246.

